No. 10136

United States

Circuit Court of Appeals

For the Ninth Circuit.

J. HOWARD EDGERTON and CLIFFORD W. TWOMBLY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

In Three Volumes

VOLUME III

Pages 899 to 1191

Upon Appeals from the District Court of the United States for the Southern District of California, Central Division

Rotary Colorprint, 590 Folsom St., San Francisco

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"In the District Court of the United States
In and for the Southern District of California
Central Division.

No. 14943-RJ
Criminal

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. HOWARD EDGERTON, et al.,
Defendants.

To the Honorable Ralph E. Jenney, Judge of the Above Entitled Court:

The following is a continuation of the Motion to Strike on behalf of the Defendants Ireland and Edgerton. Previously, this Motion has been argued orally before the Court, and at the request of the Court for the remaining portion of the argument it is herewith submitted in writing. As stated before Your Honor in Court, we except to this procedure, but will endeavor to comply therewith with the facilities available and limited time at our disposal to argue the Motion in writing.

It is our understanding by adoption we may and do hereby include as though fully set forth herein, the grounds and argument as to the evidence which counsel for Defendants Starr, Thomas and Smale has set forth in his written Motion to Strike on file herein, insofar as the

same is applicable to the Defendants Ireland and Edgerton.

Generally speaking, the Motions to Strike on behalf of the Defendants Thomas and Smale are applicable to the Defendant Ireland, with the exception of one distinction, [679] which will be hereafter pointed out. Ireland was identified with the Railway Mutual Building and Loan Association, the First Security Deposit Company, the Investment Finance Company, and the R. F. D. Discount Company, later the Consolidated Investors Company, over approximately the same period of time, and at intervals was in common with Smale and Thomas a Director in those companies. As to Ireland, however, there is this vital distinction: He was at all times an employee, and as such devoted his full time to the various enterprises. His salary ranged from $125.00 to $200.00 a month. He did not occupy any executive or key position. His voice is not heard in shaping or directing policies or management. True, he was a member of various Committees, but only in subordinate capacities. It is a fair inference that whatever he may have done as a Director or a Committee member that it was done as a matter of convenience of his employers. By tracing the activities of Ireland through the minutes of the First Security Deposit Company and the minutes of the Investment Finance Company, the conclusions herein stated can be established.

The following will be confined to the Motion of the Defendant Edgerton to Strike, which is supplemental and in addition to the specifications, grounds and argument on behalf of the Defendants Starr, Thomas and Smale, as hereinabove stated. An attempt will be made to classify objectionable evidence because we believe that Edgerton's connection with the evidence requires classification. In doing so, however, we do not waive the more specific analysis of identified objections by Mr. Irwin.

It will be recalled that Mr. Edgerton is and was at all times wherein he is mentioned in the evidence, an Attorney at Law. He was at all times, wherever he is mentioned in [680] the evidence, counsel for the Security Company, the Finance Company and the Collateral companies, and acting in that capacity. Parenthetically, for brevity, we shall hereinafter refer to the First Security Deposit Company as the Security Company, and the Investment Finance Company as the Finance Company. Edgerton was never a Director or officer of the Security Company until he became manager of that Company October 9, 1938, which is the only office, if this be considered as an office, which he held. He was one of the incorporators of the Finance Company and a director thereof from date of its organization, August 5, 1935, until February 16, 1938, when he resigned. His name appears in the Minutes of the Finance Company as Vice President, but with rare ex-

ceptions do the Minutes show that he exercised the prerogatives of that office. Edgerton was appointed Attorney of Security Company on February 19, 1936, (Exhibit 18, Minutes of that date). Prior thereto the law firm of Nourse, Betts and Jones, with which firm Edgerton was associated, were the attorneys, and whatever Edgerton did was as a representative of that firm, up to February 19, 1936. The identity of that firm with the evidence commenced presumably in the middle of 1933 in either the month of June or July.

The defendant Edgerton does hereby move to strike from the evidence and all testimony connected therewith Exhibits 18, 19 and 20, which constitute the Minute Books of the Security Company, on the grounds that they are:

1. Hearsay.
2. Immaterial.
3. Not binding upon the defendant Edgerton, as it does not appear that he had any knowledge of, or participated in any of the matters therein referred to as related to the scheme to defraud and the conspiracy, [681] as alleged in the Indictment.
4. The Government has failed to connect up the defendant Edgerton with said Exhibits.

Said defendant further moves to strike on the same grounds as hereinabove stated as to Exhibits 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 136, 136-a, 136-b, 138, 139, 139-a, 140, 141, 141-a, 142, and 73. The

foregoing exhibits, up to Exhibit 136, are records of the Security Company, such as Journals, Bond Register, Check Record, Cash Receipt Journal, Stock Ledger, General Ledger, Transfer Binder, etc. The Exhibits numbered from 136 on are miscellaneous correspondence in the early stages of the company's operation.

The evidence shows that Edgerton's only relation, if any, to these documents, was as counsel up to February of 1936, as a representative of the firm of Nourse, Betts and Jones, and from and after February 19, 1936, as a counsel in his individual capacity. He attended the meetings of the Board of Directors as counsel, and if his presence at the Board meetings is to be concluded as imparting knowledge to him of the matters recited in the Minutes of those meetings, those minutes reflect that he acted as an attorney upon those matters, which were submitted to him for his consideration. Whether his advice was good or bad is immaterial, so long as he acted as an attorney in good faith, and it is submitted that the Minutes are conclusive on this point. Clearly, his position as attorney does not impute to him knowledge of the records of the company embraced within the Exhibits other than Exhibits 18, 19 and 20.

If it be concluded by Your Honor that the position of Edgerton is not tenable from and after October 9, 1938, when he became General Manager of the Security Company, then

we [682] submit that all of the portions of Exhibits 18, 19 and 20 and the other records of the company up to said October, 1938, should be excluded for the reasons as hereinabove stated.

The case of United States vs. Wise, 102 Fed. (2d) 379, is in point. This was a prosecution for conspiracy to use the mails to defraud, involving the sale of commercial paper secured by fraudulent warehouse receipts. The evidence showed that certain of the defendants organized, controlled and managed a corporation known as the Continental Credit Corporation, and that this corporation issued the fraudulent paper. The defendant Wise was an attorney. He represented the Continental Credit Corporation in various employments. At one time when certain of the other defendants were ill he managed the corporate business for a period of a few weeks. He never attempted to sell any of the notes or dictate the company's policy. There was no evidence that he had profited by the frauds. The Court said, at page 381:

> 'It may seem almost axiomatic to say that the investigation of crimes and the detection of the guilty participants usually involves a study of motives and intent. The presence of intent calls for the existence of knowledge. Fraud, civil or criminal, is almost always practiced for gain, where-

in springs the motive. To make money or to get possession of money or its equivalent usually prompts those who practice fraud and those who scheme to defraud. When a fraud is uncovered there usually follows a disclosure with someone profiting out of the fraud.'

And again at page 382:

'Participation in a fraudulent scheme is usually accomplished by secrecy of plans, the concealment [683] of action. Yet Wise, before accepting a position with Continental, some 30 days before the Receiver was appointed went for advice and guidance to the Indiana State Banking Department, the head of which believed his participation in the company would be helpful and encouraged him.'

Further,

'No version of this evidence and no construction can be given to any transaction which supplies a motive for, or an intent by Wise to defraud, and indeed strange would be a fraud where its promoter had neither a gainful incentive or an intent to assist others in illegitimate efforts at enrichment.'

The evidence in the case at bar shows that Edgerton started to practice law in the office of Nourse, Betts and Jones in 1931, and as a representative of that office he handled the work

of the Security Company up to February of 1936. Whatever compensation he received was presumably paid to him by that firm from and after February of 1936, when he acted as counsel individually. The minutes and the records show that his compensation for his services were modest and consistent with his employment as Attorney, and there is nothing in those records or Minutes which have any materiality as bearing upon intent for participation in the scheme or conspiracy, as alleged. It may also be fairly assumed that having acted as counsel under the direction of Nourse, Betts and Jones, that he was justified in continuing as counsel for the company in his individual capacity, and that he was acting in the best of faith. See also the case of Firpo vs. United States, 261 Fed. 850, wherein the appellant was an attorney-at-law who was convicted of procuring a [684] soldier to desert from the army and of counseling the deserting. It appeared that the appellant had expressed an opinion to the soldier's father that there were legal grounds for his exemption from service. In these circumstances, the Court in reversing the conviction, stated, (Pages 852-853):

> 'If there appeared to the plaintiff in error reasonable grounds for the expectation of success, it was not criminal for him to advise his client to remain away from the authorities. At least such would be true in the absence of bad faith or criminal

intent on the part of the plaintiff in error. To assist, as used in the statute, applies guilty knowledge and felonious intent. Knowledge of the wrongful purpose of the deserter. To assist with such knowledge and intent is serving the purpose of the deserter. It encourages him and aids him and thus the offense may be committed. To assist, like to abet, involves some participation in the criminal act. To advise a client to commit an act which is a crime makes the lawyer an accomplice, and at common law he would be an accessory. We are not satisfied from this record that there was evidence to submit to the jury indicating a knowledge on the part of the plaintiff in error that Shillace was a deserter and was continuing in his desertion from the service of the Army of the United States at the time when he was advised to remain away and go to Connecticut, where it was suggested that he had relatives. Indeed, the plaintiff in error's view seems to have been that Shillace was wrongly kept in the Army and that he was entitled to discharge by reason of his age. We think [685] the plaintiff in error was giving his best advice, and opinion, as to his client, without any intent of violating the law and in doing so what he thought was the realm of his professional obligation his client.'

An examination of Exhibits 18, 19 and 20 will show that Edgerton was at all times advising his client, the Security Company, in the best of faith, and that many times he gave advice which was not accepted. (See Minutes of February 20, 1935, and of May 15, 1935, Exhibit 18).

Defendant Edgerton moves to strike from the evidence the following Exhibits on the grounds that they are:

1. Hearsay.
2. Immaterial.
3. Not binding upon this defendant or connected up by the Government with this defendant, and not bearing upon any of the issues in this case.
4. No proper foundation.

Exhibits 131, 132, 133, 134, 135 and 137.

The foregoing comprise correspondence relative to the reorganization in its preliminary stages from December 10, 1931, to July 19, 1933.

Defendant Edgerton moves to strike from the evidence the following Exhibits on the grounds that they are:

1. Hearsay.
2. Immaterial.
3. Not binding upon this defendant or connected up by the Government with this defendant, and not bearing upon any of the issues in this case.
4. No proper foundation.

Exhibits 103, 104, 105, 106, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 72-a, [686] 72-b, 72-c, 75, 76, 95, 96, 97, 98, 99, 100, 101, 102.

These Exhibits relate to the activities of the R. F. D. Discount Company, later named Consolidated Investors Company, in connection with what has been referred to in the evidence as the Reed Brothers transaction, and secondly the transfer of the assets of the Consolidated Investors Company to the Finance Company for a consideration of $36,000.00. The emphasis placed upon this evidence is all out of proportion to its importance or materiality, if any. We assume that in part the Government intends to prove by this evidence that the defendants intended to secure stock control of the Security Company and the Finance Company. This much we will stipulate to. It was not only the purpose, but the plan of the defendants to do this very thing, deemed necessary to carry out the purpose of the original plan and agreement. An examination of that document will disclose that the defendants had the right to secure such control, if not a duty to maintain it, and upon the face of all of the Exhibits above referred to there is nothing of an illegal character. To allow this evidence to stay in the record is to create a false issue before the jury. In other words, the defendants may be tried in great part upon the management of that company. These Exhibits show

that the defendants organized the R. F. D. Discount Company and transferred thereto their personal assets, consisting of securities of the Security Company and they later caused to be transferred by the Consolidated Investors Company those assets to the Investment Finance Company for a consideration of $36,000.00, which was in turn re-invested in the Finance Company, with the exception of $5,000.00, whereupon the Consolidated Investment Company was dissolved. For his services in connection with the Reed Brothers transaction, [687] Edgerton received a fee of $1,000.00. There is no showing but what the same was a reasonable fee.

Defendant Edgerton moves to strike from the evidence the following Exhibits, on the grounds that they are:

1. Hearsay.
2. Immaterial.
3. Not binding upon the defendant or connected up with him by the evidence.
4. No proper foundation.

Exhibits 36, 37, 38, 39, 40, 41, 42, 43, 44, and 45.

The foregoing relate to the Minute Books (Exhibits 36, 37 and 38), and general records of the Finance Company, including the Journals, Ledgers, Cash, Check, Securities and Sales Records, etc. The same argument to strike these Exhibits from the records that was made on behalf of the Security Company's records, is applicable, with the added feature that Edger-

ton was a Director in the Finance Company from August 5, 1935, to February 16, 1938, and appears on the Minutes as a Vice-President throughout. It is submitted that an officer of a corporation is not criminally answerable for any act of the corporation in which he is not personally a participant. (See authorities cited and discussed in our Brief on file with Your Honor, pages 7 to 20).

Any statutory provision which attempts to fasten upon a Director of a corporation criminally guilty knowledge of the affairs of such corporation in the absence of actual knowledge is unconstitutional. (See cases cited, and discussed in our Brief, pages 23-27.)

It should be added that Edgerton was appointed General Manager of the Investment Company on October 19, 1938, but whatever bearing this may have upon acts of the corporation subsequent to that date is not to be confused with acts [688] occurring prior to that time.

Defendant Edgerton moves to strike from the evidence the following Exhibits, on the grounds that they are:

1. Hearsay.
2. Immaterial.
3. Not binding upon the defendant, nor within the issues of the case, nor has he been connected up therewith by the Government.
4. No proper foundation.

Exhibits 47, 48, 49, 50.

These relate to the records of the American Building and Investment Company, which we submit is a purely collateral matter, and has no bearing upon the issues within this case.

Defendant Edgerton moves to strike Exhibit 107, on the ground that it is:

1. Immaterial.
2. Not binding upon this defendant, nor within the issues of the case.
3. No proper foundation.

This is Cashier's Check dated March 26, 1934, to Realty Deposit.

The next classification will relate to the so-called victim evidence, which may be submitted and argued as a class.

Defendant Edgerton moves to strike from the evidence all of the testimony of the following named persons, and the Exhibits relating to such persons, as hereinafter set forth under their respective names, on the grounds that they are:

1. Hearsay.
2. Immaterial.
3. Not binding upon Defendant Edgerton, nor connected [689] up with him.
4. No evidence showing that the letters of Investment Finance Company or of the First Security Deposit Company were written or mailed with the knowledge, consent, or authorization by defendant Edgerton.

Mrs. D. F. Talamantes (Counts 5 and 14), Exhibits 159, 166, 182, 183, 184 and 185.

Dr. F. W. Kidder (One of the Overt Acts in 15th Count) Exhibits 186 and that portion of Exhibit 45, page 1033, (page 1656 of Transcript which was right under the evidence).

Grace G. Benn (Count 11), Exhibits No. 187, 188, 189, 156, 163, 163-a, 190.

Fred O. Morse (Count 8), Exhibits 191, 192, 193, 158, 161, 164, 194, 195, 196, 197, and 198.

Audra D. Jones, Exhibit 199.

Mary L. Wisely, Exhibits 200, 201, and that portion from Exhibit 45, purchase order No. 971, dated April 6, 1938, read into the record at page 1779, Transcript.

Leland H. Bidleman (Counts 1 and 9), Exhibits 202, 202-a, 203, 204, 205, 167.

Clarence M. Hicks, Exhibits 206, 207, and 208.

Alice Geddes, Exhibits 209 and 210.

Wade H. Robinson, Exhibits 211 and 212.

Lyman S. Walker, Exhibits 213, 214 and 215. [690]

Dennis S. Taylor (Count 6), Exhibits 168, 160 and 165.

George U. Richmond, Letter of July 19, 1938, Exhibit .....

All of the foregoing refer to what has been referred to as 'victim evidence.' It will be noted that the last letter sent dated October 31, 1938, to Mrs. Talamantes, referred to in the

Fourteenth Count, is the month in which Edgerton was appointed General Manager of the Security Company, and also of the Investment Company, and did not in reality assume his duties as such, until the following month of November, 1938. In other words, the letters referred to in the first Fourteen Counts are letters mailed at a time when the defendant Twombly was General Manager of those companies, and do not span the time when Edgerton was in charge, except for the brief hiatus between the dates of his appointment, October 9, 1938, in the Security Company, and October 19, 1938, in the Investment Company. Some of the carbon copies introduced into evidence bear the initials of Edgerton, patently submitted to him for his approval as counsel, and it is submitted that in the letters there is nothing of a criminal character or that could be construed by him as such. It will be presumed that such letters that did not bear his initial were without his authority or approval, even as attorney. There is no evidence in the record of the Minute Books of either the Security Company or the Finance Company or in any other part of the record that shows the specific authority by Edgerton to either Twombly or Cronk to write any of the letters above referred to, or to perform or do any act in connection with the subject matter thereof, which authority we submit is necessary to bind Edgerton. It will be noted in this connection that there is

no evidence in the record showing that Edgerton [691] gave any instructions or authority in connection with any matter except the expression of a legal opinion, and particularly is this true up to and including the time when he became General Manager of the Security Company and the Investment Company.

The civil doctrine that a principal is bound by the acts of his agent within the scope of the agent's authority has no application in criminal law. If a principal is liable at all criminally for the acts of another, such liability must be founded upon authorized acts. (See our Brief, pages 27-a, and pages 82-88).

Defendant Edgerton moves to strike from the evidence the following testimony and the Exhibits related thereto, on the following grounds, that it is:

1. Hearsay.
2. Immaterial.
3. Not binding on the defendant Edgerton, and not connected up by the Government with the Defendant Edgerton.
4. No foundation.

Joan Marie Brauer

Exhibits 156, 157, 158, 159, 160, 161, *163*, 163, 164, 165, 166, 167 and 168.

Defendant Edgerton moves to strike the testimony of the witness Myron W. Reed and Exhibits 108, 109, 110, 111, on the grounds that the same are:

1. Hearsay.

2. Immaterial.

3. Not binding upon the defendant Edgerton and not connected up with him by the Government and relating solely to collateral matters and not within the issues.

4. No foundation.

Defendant Edgerton moves to strike from the evidence [692] the following Exhibits relating to the Pierce Petroleum matter, and all other matters in the record relating to the said transaction and not herein specifically mentioned, on the grounds, that the same are:

1. Hearsay.

2. Immaterial.

3. Not relating to any of the issues of the case and not binding upon the defendant Edgerton, nor are they connected up with him by the Government.

Exhibits 80, 81, 83, 84, 180 and 181.

Defendant Edgerton moves to strike from the evidence and all records therein the comments of H. Dean Campbell in his report to the Board of Directors of the Investment Finance Company, contained in Exhibit No. 46, and also appearing in the Transcript, pages 196-197, on the following grounds:

1. That said statements are hearsay.

2. Said statements are immaterial.

3. Said statements are conclusions.

4. Said statements are not binding upon the defendant Edgerton, nor connected up with him by the Government.

5. Said comments contain expressions of opinion on matters specifically excluded from evidence by other rulings of the Court.

6. That if permitted to stand in the record said comments will impose upon defendant Edgerton the burden of proving his innocence.

7. Said comments create prejudice in the minds of the jurors and create false issues in the case.

8. Said comments have no bearing upon the specific intent with which the defendants are charged in the indictment. [693]

The witness Long testified that the report was received by the Finance Company and placed in the files of the company. (Transcript, p. 196-197). This is the only foundation for its reception.

These comments are, in our opinion, clear hearsay. Any attempt to make them a part of the files of the company does not cure that weakness. If a showing had been made that it was customary to receive such comments from their auditor, that he had been requested to make them, and that it was the practice of the company to keep such comments as a part of their records, there may be some justification for admitting this evidence in record, but even in that event it is extremely doubtful. There was no showing that Mr. Campbell was not available as a witness. In fact, it can be stated that Mr. Campbell has at all times been available and was in the Courtroom during a

part of the trial, and we are under the impression that he was in the Courtroom on the day that these comments were read into the record. The admission of this evidence deprives the defendants of cross-examination. The statements are in the nature of an accusation, and no limitation the Court could place upon their reception into evidence can cure the damage. The Government introduced this evidence upon the theory that it shows intent on the part of the defendants. How can the declaration of a third party prove the intent of the defendants without assuming the truth or falsity of the comments? By specious reasoning, this evidence would imply a duty on the part of the defendants to either affirm or deny the truth or falsity of the statements, and by such declaration or their conduct would indicate their intent. We surely should not be so naive to assume that the Government intended an implication that the statements were false. [694] Plainly, it is intended to imply that they are true. The limitation of intent was placed upon these comments by the Government after objection and argument, and was originally offered without any limitation. As stated, when the evidence offered, we again repeat that if Mr. Campbell were to take the stand he would not be permitted to testify to the opinions stated in the comments. The transmittal of his report containing these comments, we submit, is not on the same

basis of any conversation which Mr. Campbell may have had with defendants with respect to these matters.

Defendant Edgerton moves to strike all the testimony of the witness C. E. Webster, starting at page 1962 of the Transcript, and Government's Exhibit 216, which is the statement of defendant Twombly, on the grounds that it is:

1. Hearsay.
2. Immaterial.
3. His statement not made in the course of the conspiracy, but made after termination of Twombly's connection therewith, and after the termination of the conspiracy, as alleged in the indictment.
4. Not binding upon the defendant Edgerton, not within the issues of the case, nor connected up by the Government as to the Defendant Edgerton.
5. The statement is a recital of the conclusions of Twombly.
6. A narration of past events and not material for the limited purpose for which it was introduced, to wit, to show the intent of the defendant Twombly.
7. Of such a prejudicial character that the limitations placed upon its reception in evidence by the Court cannot cure such prejudice.
8. Burden of proof is placed upon the Defendants to [695] prove their innocence.
9. Insufficient foundation.

We realize that this statement was offered for the limited purpose of showing the intent of the defendant Twombly, and that it was excluded as to the other defendants. We also realize that there is considerable latitude given to the Court wherein matters bearing upon the question of intent may be admitted. If this were the only evidence available to the Government to establish the knowledge of Twombly as to the matters recited in his statement and from which knowledge intent could be inferred, then probably, but in our opinion still doubtfully, could such evidence be tendered. But the complete records were in evidence, and from which the inference of knowledge and intent can be inferred, and there was no necessity for the introduction of the statement which at best would be cumulative.

Defendant Edgerton moves to strike from the evidence all of the testimony of the witness Clarence N. Bruce, on the following grounds, that it is:

1. Hearsay.
2. Incompetent.
3. Not binding upon the defendant Edgerton, nor connected with him.
4. Containing statements of matters not involved within the issues of the case.
5. Statement of opinion and not of fact.
6. Statements of summaries based in part upon immaterial matters, while purporting to

be a summary of facts based upon material matters.

7. Insufficient foundation.

We call the Court's attention to our previous observations with reference to the connection of Edgerton with [696] the various enterprises involved for an admitted period when he was only counsel, and not acting as an officer or director of the Security Company, and the Finance Company, and the records upon which the witness Bruce predicates his summaries include those exempted periods of time. We also call to the attention of the Court that the summaries of Mr. Bruce, particularly with reference to discounts and profits and loss, are based upon a discount from the par value of the securities, and not on a discount from the market prices thereof.

Respectfully submitted,
GORDON LAWSON,
Attorney for Defendant Edgerton." [697]

* * * * * * *

The Court:

"Now, I have given very careful consideration to these motions to strike. I don't think the legal literature would be enriched by any discussion of mine in connection with the matter, and I don't think that counsel for either the Government or the defendants would learn anything that they don't already know, so I am not going to waste their time. I have come to

the conclusion that the motions to strike as to the defendants Edgerton, Starr, Thomas, Smale and Ireland must be denied in toto.

Mr. Irwin: Exception, please, your Honor.

Mr. Lawson: Exception.

The Court: That is the ruling of the Court. Exception allowed as to all defendants. I say that in order not to waste time by the plaintiff discussing those matters. I find, under my view of this case, that for the present at least the motion should be denied and the evidence should stay in."

"The Court: * * * I wanted to have the motions for directed verdict, insofar as is possible, before me to give them consideration as, of course, they are something else again different from the motions to strike. After we consider the motions to strike, insofar as the defendant Twombly is concerned, I then suggest to all of counsel for the defendants that they file their formal motions for directed verdict and add any other elements upon which those motions may be predicated. It may be that counsel will feel that they are sufficient simply to move that they be considered that they may be deemed to have been made in accordance with the written motions, and that the written motions be filed with the clerk, which will be permitted. If they have anything to add, I shall be glad to listen to that. To what extent I shall listen to any [698] argument on

those directed verdicts, I will keep my mind open until we finish with this matter this morning."

Thereafter the plaintiff then argued in opposition to the written motion to strike filed on behalf of the defendant Twombly, during the course of which the following proceedings were had:

"Mr. Campbell: * * * As to the approval by the superintendent of banks, that is a legal matter for instruction.

The Court: Where are you now? You are at the bottom of page 10?

Mr. Campbell: At the bottom of page 9 and top of page 10?

The Court: Now, wait a minute. In one sense yes, and in another sense no. As I view this record, the situation is substantially this: There is an allegation in the indictment, clarified to some extent, at least, by the bill of particulars furnished by the plaintiff, charging that representations were made to certain specified persons or persons in a certain class; that the assets transferred out of Railway Building and Loan to First Security Deposit Corporation would be invested only in investments approved by the Superintendent of Banks or the State Corporation Department. Now, suppose they did. There is no evidence in the record to indicate that that representation isn't 100 per cent true, particularly as to the State Corporation Department. We needn't

consider the question of whether it is a matter of which the Court might take judicial notice or whether it is a matter of common knowledge as to the class of investments approved by the Superintendent of Banks; but there certainly could be no such judicial or common knowledge as to the State Corporation Department because the State Corporation Department acts only in a particular instance and there is [699] no evidence that the Corporation Commissioner didn't act. No representative of the banking department, no representative of the Corporation Commissioner was ever put on the stand and said, 'We never passed upon any application. No application was ever made to us.'

As I see the record, the representation is there but the falsity of the representation has never been proved.

Mr. Campbell: I disagree with your Honor in that regard because the evidence, as I view it, shows that certain properties, certain funds, were converted to the use of the defendants themselves; and if that fact is established, that then is proof of the falsity of that representation. But aside from that, without arguing that proof at all, if that were true, if there were no proof—let's assume for the purpose of argument that there is no negative proof here that there was no such allegation: That then would be a matter for instruction.

The Court: That there is no such——

Mr. Campbell: We will assume that the rec-

ord shows barely that the representation was made and nothing more.

The Court: Yes. You said no such allegation.

Mr. Campbell: No, I didn't mean that, but the record stops there. That then is a matter, I submit, for the instruction of the Court to the jury, that there has been no evidence offered by the plaintiff or that there has been no evidence received showing that that was a false representation and, therefore, the jury cannot consider it as such. This is not a motion to strike from the indictment.

The Court: That was the point of my original remark. I don't think you can strike something that is negative, and I don't think that it has any place in a motion to strike, but I am simply calling counsel's attention to it because, as [700] I indicated in my preliminary remarks, I am going to say to the jury that allegation of the indictment must be ignored by you because it has no bearing upon the case, no evidence having been introduced to show that it wasn't true.

Mr. Campbell: Assuming that the record stands in the same state."

* * * * * * *

"The Court: May it be stipulated that as to all of the defendants except the defendant Twombly, whom I will cover by a separate stipulation, that at this point there may be deemed to have been made motions for a di-

rected verdict in form as indicated in written motions which are now before the Court and that those motions may be filed in the records of the case as exhibits next in order of the defendants and, therefore, need not be copied into the transcript?

Mr. Irwin: May I make this observation, if your Honor will permit it: I question, if I may, your Honor, whether or not it may be marked for an exhibit and be properly incorporated in the record, because it really isn't evidence."

* * * * * * *

The Court:

"May this be the stipulation: that each defendant, through his counsel, with the exception of the defendant Twombly, may be deemed at this time to have made an oral motion in open court for a directed verdict in the form and wording as indicated in the written motions for directed verdict which were handed to the Court yesterday and which are now in court; that each of these motions for directed verdict may be copied into the record with like effect as though they had been read in open court.

Mr. Campbell: So stipulated.

Mr. Lawson: So stipulated." [701]

Which said written motion for a directed verdict was in the words and figures following:

"In the District Court of the United States in and for the Southern District of California, Central Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. HOWARD EDGERTON, et al.,
Defendants.

MOTION FOR DIRECTED VERDICT

Pursuant to the order and direction of this Court, made on March 20, 1942, hereinafter submitted in writing, defendant J. Howard Edgerton's written motion for a directed verdict of not guilty, the defendant, through his counsel, wishes the record to show that objection to this procedure is made and exception is taken on the grounds that:

1. He is required to state a motion for a directed verdict before the Court has ruled on the Motion to Strike, which it is respectfully submitted places an incongruous burden upon him.

2. That the great mass of evidence tending to support the Motion for a directed verdict is contained in the voluminous Exhibits heretofore received in evidence, which have not been copied into the transcript, and therefore in the time permitted cannot be the subject of a careful written analysis and Briefs.

The Defendant, J. Howard Edgerton, through his counsel, Gordon Lawson, moves this Honorable Court to direct the jury to return a verdict of not guilty on the following grounds:

1. There is no substantial evidence to show the exist- [702] ence of the scheme charged in the first fourteen counts of the indictment; there is no substantial evidence to show the existence of the conspiracy charged in the remaining count of the indictment;

2. There must be substantial evidence on each and every essential element of the crime charged, otherwise it is the duty of the trial court to direct the jury to return a verdict of not guilty.

(a) There is no substantial evidence to show that if (but in no way conceding) the scheme charged in the first fourteen counts of the indictment, has been shown to have been devised as charged, that the defendant J. Howard Edgerton with knowledge of its existence, participated in said scheme; that as to the conspiracy charged in the remaining count of the indictment, if it is shown that such a conspiracy existed there is no substantial evidence to show that the defendant with knowledge of such scheme participated in or furthered the objects of, said conspiracy;

(b) There is no substantial evidence to show that the defendant J. Howard Edgerton did with specific intent do any of the acts charged

in the indictment, that is to say specifically intended by any act of his or at all to become a party to or further the object of the scheme charged in the first fourteen counts of the indictment; nor did he with specific intent become a party to or further the objects of the conspiracy charged in the remaining count of the indictment;

(c) There is no substantial evidence, or any evidence, to show that the defendant J. Howard Edgerton, or any of the other defendants herein, did depress and/or cause to be depressed, the market price of the securities of First Security Deposit Corporation, as charged in the indictment, and that as [703] a result thereof the defendants might or did acquire the same from the persons intended to be defrauded at prices greatly reduced from the par value thereof, as further charged in the indictment.

(d) There is no substantial evidence, or any evidence, to show that the defendant J. Howard Edgerton, or that any other of the defendants herein, did represent to the persons intended to be defrauded that the First Security Deposit Corporation would and did loan or advance money only upon security or properties theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California, as charged in the indictment.

(e) That there is no substantial evidence, or any evidence, to show that the defendant J.

Howard Edgerton, or that any of the other defendants herein, did convert and divert to their own use, benefit or profit, large sums of money, or any sums of money, or property, of the First Security Deposit Corporation, or of the persons intended to be defrauded, under the pretense of loans, or by any other means or method, as charged in the indictment.

(f) There is no substantial evidence, or any evidence, to show that the defendant J. Howard Edgerton, or that any of the other defendants herein, did falsely represent or pretend that the First Security Deposit Corporation was organized for the purpose of, and duly and actively engaged in the liquidation of the assets received by it from the Railway Mutual Building and Loan Association, and that pursuant to and under said false representation or pretense did convert said assets to their own use or benefit, as charged in the indictment.

3. There is a fatal variance between the allegations [704] as charged in the indictment, and the proof, in that:

(a) From the indictment it appears, as construed by counsel from the date of his association in the case, that it is alleged that the scheme charged was formed on or about November 1, 1932, and there is no substantial evidence that the scheme charged and/or the essential elements in the scheme, are not shown by any substantial evidence to have existed prior to November 1, 1932.

(b) If Government counsel's contention first announced in the limited argument on the Motion to Strike as heard before your Honor March 20, 1942, is correct, i. r., that no fixed time limit is set in the indictment, and that it is a question for the jury to determine whether the scheme was formed any time prior to the mailing of the letters, then and in that event it is respectfully moved and urged that the indictment is fatally defective in that it does not state the offenses charged with certainty, and that the whole indictment should be quashed for that reason, and on that ground it is so urged.

4. Because upon the entire record the testimony fails to sustain the charges made in the fourteen substantive counts of the indictment and/or the remaining conspiracy count of the indictment and does not exclude all other reasonable hypotheses of innocence; and because, upon the whole record, a verdict of guilty could not be said to be sustained by the facts and circumstances as they appear which are at least as consistent with innocence as with guilt.

It is respectfully requested that the Motion herein made, together with all the grounds urged, be incorporated in the record outside the presence of the Jury, together with the ruling of the Honorable Court.

Respectfully submitted,

(Signed) GORDON LAWSON,
Attorney for Defendant Edgerton." [705]

* * * * * * *

"Mr. Lawson: I take it from what your Honor has said that your Honor does not want any oral argument.

The Court: Not at this time. I just want to get the record clear as to points. If you had any other points that you thought about since, I wanted to give you a chance to put them in.

Mr. Lawson: No, your Honor, I think everything is in the motion that is filed.

Mr. Irwin: May I hedge, as we say, for a moment, your Honor? I think this point is included in my original motion under No. 10 on page 2, line 7, wherein I stated there is no substantive evidence to show the existence of the scheme. I did not particularize, and should for any reason it be stated that I haven't brought it directly to the Court's attention, I believe what I am about to say is included in that ground, but I would like to particularize one sentence, that the further ground on behalf of the defendants Starr, Smale and Thomas individually, that it may be deemed made individually at this time, and request the Court to return a verdict of not guilty on the ground there is no substantive evidence in the indictment.

The Court: To direct the jury to return a verdict of not guilty.

Mr. Irwin: To direct the jury to return a verdict of not guilty, that there is no substantive evidence in the record to substantiate that

portion of the indictment which alleges that the defendants did cause to be depressed and did depress the market prices.

Now, as I have stated, I think that is included in my general motion. In case it is not, I want to add that particular ground and set it forth along with those I have [706] heretofore covered.

The Court: I think it is covered. Let me ask you a question. You have had a lot of experience in these matters, all of you. We have matters to which I have called counsel's attention where an allegation is made in the indictment upon which there is no proof offered by the plaintiff in substantiation of that allegation. It has been my practice to instruct the jury, if that condition remains at the time of the instructions, to give no consideration whatsoever to that element of the indictment because no proper proof has been produced by the plaintiff in substantiation of it. Now, I, of course, couldn't grant a motion for a directed verdict on one of those things. If there was sufficient left in the indictment, assuming that there are a half a dozen of those cases, if there was still sufficient in the indictment upon which the charges would be predicated, I couldn't grant a motion for a directed verdict. That would be a matter that would have to be decided by the jury.

Mr. Irwin: Quite right.

The Court: So why should you direct the motion for a directed verdict as to a portion of the indictment?

Mr. Irwin: I see your Honor's point, and that is what bothered me, and that is the reason I only mentioned that particular part.

The Court: At the close of your own case, ah, that is an entirely different proposition. It might be proper to give the matter very careful consideration then. I think it is covered in your motion, although I didn't think it was necessary.

Mr. Irwin: If I may answer your Honor, or elaborate what I have in mind. I am having in mind that that might [707] be construed that that allegation is one of the elements of the scheme as distinguished from a representation. If that should be the situation and deficient, and if it is an integral part of the scheme, its absence then might be said that the scheme itself fails. That is why I pointed out that particular one.

The Court: I think in all fairness that the same motion on that same ground should, by a stipulation, be deemed to be made as to each and all of the defendants so as to complete the record.

Mr. Campbell: I so stipulate.

Mr. Lawson: That is the point, your Honor, that I had in mind. I wanted to have about five minutes this afternoon to cover it. That is exactly what I had in mind.

The Court: Have we covered that now?

Mr. Lawson: Yes.

The Court: Now, you see, I want you to keep your record clear, as I called attention this morning, in order to protect you on that when all the evidence is in. The picture then may be quite different. I don't know.

Mr. Lawson: I think, your Honor, that the motion as now made is available as to that argument on the state of the record, and I just wanted about five minutes. I think I can state it in that time.

The Court: Is it different?

Mr. Lawson: It isn't the grounds; it is just the statement of the argument. I am not going to elaborate upon it.

The Court: Is there anything else? If I give Mr. Lawson five minutes, I still have two." [708]

* * * * * * *

"The Court: Go ahead, Mr. Lawson. We will give you five minutes, as requested.

Mr. Lawson: Your Honor, I think we are in entire accord, as I understand your Honor, with this general principle, that it is not necessary for the plaintiff to prove each and every allegation contained in the indictment, but it is equally true that the plaintiff has the burden of proving the charge as alleged substantially. Now, by that, there is no authority that I know of that will permit the plaintiff to compel defendants to go before a jury on a mere frag-

mentary part of their case. The case that they have proven must have been substantially proved, otherwise it would throw the burden on the defendants of going before the jury and establishing their innocence.

Now, there are three elements in this case that address themselves directly to the vital part of this charge, and without that—I might almost say that without one of them, the charge has not been substantially proved. I have searched the record carefully and I know that there is no evidence in this case to show that any of the defendants at any time ever represented to any of the investors that the First Security Company would make loans that were secured by legal investments approved by the State Corporation Department or the Superintendent of Banking.

The Court: Suppose they made the representation: There is no proof in the record that they were false. So whether they made the representations or not might not be material, as there is no proof that that was not true.

Mr. Lawson: Then it must be admitted that there was no such representation, that is, of a false character made with reference to that subject matter.

The Court: It must be proved. Under the present [709] state of the record, there is no proof that that representation was false. I don't know but what they got the consent of the State Corporation Department. I can't take

judicial notice of the State Corporation Department, because they are individualized. I might possibly have to consider as judicial knowledge or common knowledge as to the Superintendent of Banks, because every man who has been in business or in the practice of law knows the type of securities that they approve as legal for savings banks, or for any type of banking, but there is no such common knowledge or judicial knowledge as to the State Corporation Department. So, therefore, there is no evidence in this record as to the falsity of those representations.

Mr. Lawson: Yes, and construing the paragraph as a whole, because the latter part of that paragraph says, 'whereas, in truth and in fact, moneys were diverted to the Investment Finance Company.' That charge is an integral part of the scheme because that is something that just a moment's reflection will show that if the investors were told that they were going to have a company operated on a conservative basis of that kind, and then it wasn't operated on that basis, then, of course, they were deceived in a material respect.

Now, the second point stands out in the same bold relief, and that is as to the question of market price. Now, in Volume 9, just before the testimony of Mr. Bruce, we discussed that matter, and your Honor stated at that time that it would be necessary for the plaintiff to prove

that the defendants did depress market price. The plaintiff took the reverse order of proof. They first proved that the bonds were discounted below par value, which is meaningless, without some relation to the first part of the charge, [710] and that is that the defendants did depress the market prices of the securities.

Now, theer is no inhibition on the part of the First Security Company, or any other corporation, to buy those securities if they bought it fairly and paid a market price. I haven't even heard the suggestion in the case where they didn't have that right.

Now, there is no inhibition on the part of the those market prices were depressed and thereby the defendants acquired the bonds at a price less than the market price, that goes right to the very heart of this charge, because so far as the holders of those certificates, if they receive the market price, which they have received, either the market price or a better price, they have not been defrauded.

Now, that includes the holders of preferred, the holders of collateral bonds, the short-term noteholders, and every investor. The evidence is unmistakably to one point, and that is that they received market price or better.

Now, this is what mystifies me: Not only did the plaintiff not introduce any evidence to prove that, but when we sought to go into it they prevented it by objection. Your Honor will remember the testimony of Mrs. Orville Wright

where she referred the matter to her banker, Mr. Richmond, for investigation. Now, we wanted to open that up and show that after an investigation he found out that the prices which were offered by the First Security Company were fair prices and, naturally, we wouldn't have done that unless we knew that it was at least equal to or in excess of market price, and they objected to it.

Now, the same thing was true with the witness Bidleman. He said that he referred the matter to his banker, and after the matter had been referred to his banker he sold, and we [711] must presume that that was at market price.

The other witness in Long Beach testified that he had received cards from other brokers, other concerns, quoting the prices of these securities. Now, when we tried to get into it to find out what they were, they objected, and I must say that it is something that is—it is to say the least strange when the direct allegation is in that indictment, then they prevent us from trying to prove it. There is nothing strange about the meaning of market price, but, your Honor, there is this case that came to me, and I want to call it to your attention. It is really interesting. I will have to run it down. I just got it. I just happened to run into it. As a matter of fact, it is a decision of the Circuit Court of Appeals for the Tenth Circuit,

Walls v. Commissioner of Internal Revenue. The decision was handed down on July 5, 1932. In that decision the court makes this very clear definition of what the term 'market value' means. Of course, market value is synonymous with market price. There are plenty of decisions that I have quoted to your Honor that established that, and your Honor is familiar with it. * * *

Unless the plaintiff can pull a rabbit out of the hat, or if it has some crystal ball that we could gaze into and discover something here wherein market value is established in this case, it must be admitted that there isn't even the slightest suggestion of the proof of market price; and I say to your Honor that that is not merely something that they can discard and say, 'We will move on to something else;' that is the basis for the fraud.

If there has been fraud, it has been buying those securities from the investors under the market price, because if they were paid the market price, they have not been [712] defrauded, and it might even be said in a very general sense of the word, if they received the market price on those securities, and the First Security got the company, it doesn't make any difference what was done with it. They were not defrauded.

Now, the only possible avenue of escape would be that the plaintiff might now say, 'Well, we cannot prove 80 per cent of our case,

the investors, the holders of collateral trust bonds, yet, they were not defrauded, but how about the holders of preferred stock?'

Where is the proof that they have lost anything? There is no evidence in this record that they have. They didn't even introduce a statement of account of the operations of this company. Here the plaintiff has had these books for a year and a half and I thought that we would get at least an audit to show the operations of the company. A company cannot operate without money, and for the determination as to whether or not there is a profit or loss, certainly there should be some sort of a showing to show that the holders of that preferred stock had been defrauded. There is no evidence in this case, your Honor, as to that.

Now, the third, in regard to that other section of the indictment where under the pretense of loans the defendants converted and diverted large sums of money to themselves, in substance that: Where is the proof in this record that any of this money got into the pockets of the defendants?

I certainly hope that the plaintiff would not be so naive to take the position that probably in some of these little minor transactions where one or two of the individuals, individual defendants, say, bought a house or bought a car or something like that for a few dollars, that that is proof to support the charge as maintained in the indictment that [713] they diverted and converted large sums to themselves.

Those were little incidental and trivial matters, which have no bearing at all upon the main charge in this indictment.

There is my position, your Honor. I say that they were not things that are small. It constitutes the entire charge in this case and upon any one of those three we could well ask the plaintiff, not by argument, not by sophistry, but by pointing out to your Honor what is the evidence to support any one of those three.

I think, your Honor, that on a motion of this kind, even before the defendants put on a defense, that this motion should be determined in that light because otherwise, why, we are forced to take the stand and prove our innocence.

The Court: Well, counsel did pretty well. He got through in 15 minutes, anyway.

Mr. Adams: Before we adjourn, may I say one word? To this point I want to adopt everything that Mr. Lawson said except, your Honor, that in our particular case we are not concerned with preferred or common stock. We are accused of depressing bonds only. It is a very specific allegation."

"The Court: * * * I do not interpret this indictment as interpreted by counsel for the defendants. * * *

The indictment says, 'That the defendants did depress and cause to be depressed the market price of said securities.' In other words, by this action, did they cause a situation to prevail where those securities sold for less than

they would have sold had it not been for those actions, that is, sold generally in the market places of this city. That is a question for the jury.

* * * * * * *

On this question of regard to the Superintendent of the Banks and the Commissioner of Corporations, I have already [714] indicated my view as to the one of two elements which have been called to your attention, but I interpret that section also a little bit differently. 'That the defendants would and did represent to the persons intended to be defrauded that the First Security Deposit Corporation would and did loan or advance money only upon security or properties theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California.'

There is evidence in here as to letters going out concerning that statement, the representation is made there. Whether it is true or false, the representation is there, and this indictment says that the defendants made certain representations, whereas, in truth and in fact, as the defendants knew, large sums of money belonging to the corporation were loaned or diverted to the defendants and to the Investment Finance Company.

I don't regard the second clause of that indictment as dependent upon the falsity of the first part.

The third point raised—for the minute I have lost it.

Mr. Lawson: The second paragraph from the bottom, page 4.

The Court: Yes. Well, there again that is a matter for the jury to decide.

* * * * * * *

The motions of all of the defendants for a directed verdict, other than the motion of the defendant Twombly, will be denied. I will pass upon Twombly's at five minutes to 10:00 tomorrow morning, and I will ask the bailiff to have the jury here at 10:00 o'clock and we will proceed.

Mr. Irwin: Before your Honor adjourns, may the record show an exception on behalf of each defendant? [715]

The Court: The record may show that each defendant takes an exception to the ruling on the motions to strike and on the motions for a directed verdict." [716]

Thereupon the following proceedings were had:

"Mr. Irwin: Has your Honor disposed of the Twombly matter?

The Court: Yes.

Mr. Irwin: Might I address the Court.

May it be considered at this time that we are renewing, on behalf of the defendants Starr, Smale and Thomas, the motion for severance, and may the showing your Honor permitted at

the time before, be deemed to have been reiterated and reaffirmed.

The Court: May it be so stipulated as to all defendants?

Mr. Campbell: I will so stipulate.

Mr. Lawson: Yes.

The Court: Motion denied and exception allowed as to all defendants.

Call the jury."

Thereupon the following proceedings were had before the jury.

"Mr. Campbell: * * * I move on behalf of the plaintiff * * * to dismiss count 3 of the indictment." (Thereupon said count 3 was dismissed).

"Mr. Adams: The defendant Twombly will have no evidence to offer. Defendant Twombly renews the motions previously made, and rests.

The Court: Very well.

Mr. Irwin: May it please the Court, the defendants Starr, Smale, and Thomas rest. I have a matter which I wish to direct the Court's attention to, but that should be done outside the presence of the jury.

The Court: Mr. Lawson?

Mr. Lawson: Your Honor, the defendants Edgerton and [717] Ireland rest.

Mr. Butler: The defendant Cronk rests.

The Court: Very well."

Thereupon each of the defendants renewed their respective motions to limit and strike oral and

documentary evidence made at the conclusion of the plaintiff's case in chief. Each of said motions was denied by the court and to said rulings of the court each of the defendants duly excepted.

"The Court: Regardless of that, I am not very interested in technicalities. May it be stipulated that the defendants may renew their same motions for directed verdict?

Mr. Campbell: I will stipulate they may be renewed at this time upon all grounds heretofore stated.

The Court: That will be allowed and deemed to be made. It will not be again copied in the record, but the stipulation is as to each defendant all of the motions as to directed verdict heretofore made at the close of the Government's case may be deemed to have been again made ceriatum and denied, and exception allowed."

* * * * * * *

"Mr. Irwin: I understand your Honor has already ruled on the motions, that there was a ruling on the motion for renewal.

The Court: They are all denied and exceptions allowed. It is in the record." [718]

Thereupon the plaintiff made its opening argument, during the course of which the following occurred.

Mr. Campbell:

"The indictment goes on to say:

'That the defendants did depress and cause to be depressed the market price of the said

securities of First Security Deposit Corporation so that defendants might and did acquire the same from the persons intended to be defrauded at prices greatly reduced from the par value thereof, directly or through the agency of one or more of said companies and through the agency of companies whose names are to the Grand Jurors unknown, and with funds which belonged to and were feloniously and unlawfully withheld and diverted from said persons intended to be defrauded.'

And I submit to you, gentlemen, that the record is replete with evidence which showed that through their actions these defendants caused a situation to prevail wherein the security holders obtained less than the real value of their securities.

Mr. Lawson: I take exception to that remark, your Honor, and assign it as prejudicial error; that the jury be instructed to disregard it. There is no evidence in this case, either as to the actual value or the market prices of the securities.

Mr. Irwin: I join in that exception, your Honor, and I assign it as misconduct.

The Court: Will you read the statement, please?

Mr. Butler: Your Honor, on behalf of the Defendant Cronk and on behalf of the Defendant Twombly I join in that citation of error.

The Court: Read the sentence, please.

(The record referred to was read by the reporter, as follows: [719]

('That the defendants did depress and cause to be depressed the market price of the said securities of First Security Deposit Corporation so that defendants might and did acquire the same from the persons intended to be defrauded at prices greatly reduced from the par value thereof, directly or through the agency of one or more of said companies and through the agency of companies whose names are to the Grand Jurors unknown, and with funds which belonged to and were feloniously and unlawfully withheld and diverted from said persons intended to be defrauded.'

('And I submit to you, gentlemen, that the record is replete with evidence which showed that through their actions these defendants caused a situation to prevail wherein the security holders obtained less than the real value of their securities.')

The Court: The objection will be overruled. The jury are instructed that counsel is arguing the evidence as he sees it, and he is simply, in effect, saying to you—and I shall ask him to correct me if I am not stating him correctly—in substance that the various items of evidence, which have been produced before you, indicate that the situation was caused whereby these people intended to be defrauded, and other persons indicated in the indictment, were not able to get as high a price for their securities in the

sale of them as they would have been had it not been for the activities of these various defendants.

Mr. Campbell: Yes, your Honor. I thought in substance I so stated.

Mr. Irwin: Recognizing my responsibility, may I respectfully take exception to the Court's statement? I [720] feel that I should assign the statement as error, if I may, at this time.

The Court: You may.

Mr. Lawson: I will join in that exception, your Honor."

* * * * * * *

"Mr. Campbell: Gentlemen, I am going to take a short period of your time when we resume again, which I understand will be Tuesday morning. While I want you to understand, as has been told you from time to time throughout this case, that the plaintiff believes that in fairness to these defendants you should not make up your minds in this case until you have heard all of the arguments, until you have heard the instructions of the Court, and the matter has been submitted to you; nevertheless, it is entirely proper, I believe, for you to consider these facts to yourself, that have been produced here in evidence before you, and I hope that each one of you, during this week-end, if you have the opportunity and the time to do so, will think over to yourself the matters which I have called to your attention today: Matters which are here in the evidence of this

court, matters which stand on the record of this court; and, particularly, those matters in which there has been no contrary proof.

Mr. Irwin: If your Honor please, I wish to assign that last statement of counsel, directed to the jury, as prejudicial misconduct.

Mr. Lawson: I will join in that, your Honor.

The Court: Assignment denied; exception allowed." [721]

Thereafter the following occurred during the course of plaintiff's closing argument:

"Mr. Campbell: Now it was stipulated here that the investors did not sign the plan itself but that a brochure was circulated among the depositors of the Railway Mutual and in it there was an authority or consent to the plan with an instruction that they might go to the office of the company and examine the document if they so wished.

Now, gentlemen, it is the contention of the Government that it doesn't make any difference whether one, none, or 5,000 investors went down and actually examined that plan. The representation was there and it was meant for anyone who examined the plan, and they were all invited to examine it. And when reference was subsequently made from time to time to this plan of agreement, and the people were told that that was being done or was going to be done, it was done with reference to and according to that plan and under its terms, they had the right to believe that that was so and that that was being done.

Now, the evidence here in this case shows, as I recall, only one change, and that was with reference to a bond which was to be given. If any other changes were made I don't know where they are in evidence.

But the investors, in the absence of the change of those provisions, had the right to rely upon the fact that such representations and promises would be kept at all times.

It is a very similar situation—you gentlemen have had corporate experience, and you are aware of the fact that whatever type of corporation you set up you don't know what the future contingencies your company is going to have to go through. If you are forming a corporation, let's say, for a grocery store, it may be in the future that you may want to own the real property where your grocery store is located, or you may want to branch out [722] and have several grocery stores. So although the purpose of your corporation and your object is to have a corporation operating grocery stores, yet you reserve and set forth a number of rights which you maintain and retain so that when those contingencies arise, they can be taken care of.

In other words, let us use this illustration: Suppose some friend comes to you and says, 'My friend, I just organized a company down here called the A. B. Grocery Company. I am going to buy a chain of three grocery stores and operate them. It looks like a good business, and you put your money in and we will be in the grocery business.

That is the purpose and object of my company, and that is what we are going to do with the money.'

So you put your money in with him. Time goes by and you wonder how the grocery business is getting along, so you go down to find out about it. But you find that instead of any grocery stores, that your friend is operating a hotel, and you say, 'Well, where is our grocery business?'

And he says, 'Well, this is our grocery business. We are operating this hotel.'

And you say, 'Wait a minute. I put in my money to operate a grocery business. This was the object and purpose.'

'Oh, no,' says he, 'Look down here in paragraph 83. The corporation reserves the right to own and operate real property, and that is what we are doing.'

Now, that is very similar, gentlemen, for practical purposes, to the situation we have here. These people were told, or at least they were intended to be told, and for practical purposes they were told through this plan and agreement that the money would be invested in certain ways.

Mr. Irwin: Pardon me. I cite that last statement of counsel as deliberate misconduct and ask the Court to instruct [723] the jury to disregard it.

The Court: Read the statement, please.

(The record referred to was read by the reporter.)

Mr. Irwin: There is no evidence at all that that plan was ever communicated to anybody and I assign that, most respectfully, as misconduct.

The Court: Now, I don't so understand the evidence. I understood the evidence that this plan was called to the attention of those who made the exchange of Railway Mutual Building and Loan stock into the First Security Deposit Corporation stock; and that the text of that plan was available to all of them.

Mr. Irwin: True, your Honor——

The Court: And it has been relied upon in argument of nearly all of defendants' counsel in connection with their arguments as to what the First Security Company could do under the plan.

Mr. Irwin: Very true, your Honor, but when the misstatement is made that those representations were directed to any of these victims, there hasn't been a one of them who got on the stand and testified that he ever heard or read of it other than what is contained in the brochure and it would be admitted that there is nothing in the brochure about any of the details of the plan.

The Court: I think you are mistaken about that. I am satisfied that I heard the question asked of these witnesses on the stand if they deposited in accordance with the plan and they made reference to the plan.

Mr. Campbell: Mr. Lawson also referred to this statement of Mr. Campbell's (Plaintiff's Exhibit 46) and in his reference to it he says this: 'There is no evidence in this case in the first place to support the charges that are made.'

Now, gentlemen, you will recall the instruction of the Court, and you will recall the limitation placed

on this document, that the document itself is not to be considered by you as proving or [724] disproving any of the facts or statements—strike out the 'facts' —any of the statements contained herein. It is not to be considered by you for that purpose.

But let's test out Mr. Lawson's statement, that there is no evidence in the case, no evidence elsewhere, to support the charges that are made in this document. I think we are entitled to do that.

Now, let's see. Mr. Campbell starts out to say here, and he propounds certain questions——

Mr. Lawson (Interrupting): Your Honor, and Mr. Campbell, I don't have a copy of my argument, but I think, your Honor, that I did make that first statement and I caught it and withdrew it. That is my recollection, because I didn't want to open it up.

Now am I right or am I wrong.

Mr. Campbell: No, you did not, Mr. Lawson.

The Court: I remember you making the statement. Whether you withdrew it or not, I don't know.

Mr. Campbell: I will refer to the record.

The Court: We will have to consult the record.

Mr. Lawson: I assume it wasn't an issue in the case and I didn't want to make it an issue.

Mr. Campbell: The statement appears on page 3134 and the statement is as follows:

> 'Those documents—that document there of Mr. Campbell has been placed before you solely for the purpose of showing the intent of the defendants. Now, I have shown you that there

is no evidence in this case, in the first place, to support the charges that are made. The question of intent is more or less now a question of an academic one but, in any event, Mr. Irwin has pointed out to you, from the records, the reaction of these men with reference to that document.

Now, to me, it is sort of a bit of sophistry, shall I call it, [725] to say that should you have any reaction to an instrument of that kind there should be any evidence of it, because when you say that you will have to say you assume either the truth or the falsity of the statements therein contained, which are not before you.'

Then he goes on to say that the defendants acted in the utmost of good faith. That is his statement. Now may I proceed, your Honor?

Mr. Lawson: Your Honor, I still think that that statement is subject to the position we have taken, that the truth or falsity of the statements made by Mr. Campbell are not at issue, and if counsel is trying to take a different position, I am certainly going to assign that as misconduct.

Mr. Campbell: I am simply taking the position, if the Court please, that when counsel states that there is no evidence in the case, in the first place, to support the charges that are made, we are entitled to look elsewhere in the case and examine the proof elsewhere as compared to the statements made by Mr. Campbell.

The Court: I find the statement directly made

on page 3134, line 19, as read by Mr. Campbell, counsel for the Government, and there is some considerable more along the same line.

What was withdrawn was a statement with regard to Mr. Edgerton.

Now in spite of the fact that that document was not admitted in evidence as proof of the truth or falsity of the statements contained in it, but merely to show the intent, the charge of counsel is that there is, as I understand the charge, in the argument, that there is nothing in the record to substantiate any of those charges.

Now Mr. Campbell proposes to show the jury that there is something in the record to substantiate at least some of the charges, and I see no impropriety in it. [726]

Mr. Lawson: Your Honor, I think that the plain interpretation of the statement made there is that there is no evidence to sustain the charges. Now the charges naturally refer to the charges in the indictment.

The Court: I don't so interpret it.

Mr. Lawson: If you will look at the nature of the comments that are made there by Mr. Campbell, they are not in the nature of charges, they are first in the nature of hypothetical questions, and he so states them. He isn't making any accusation, he is simply raising the question.

The Court: You were the one that raised. Let me read it to you.

> "Now, that brings us to a couple of documents that are in evidence. Gentlemen of the

jury, the Court has placed the limitation on that evidence, and I know that you will respect it, and I say this considerately and not with the intention of trying to ingratiate myself into your good graces, but if you weren't the type of jury that you are, I would be hesitant about even permitting you to have a document of that kind before you if I didn't feel as though you would honestly and sincerely respect the limitation and the instructions of the Court with reference to those documents, because it is important. We are all human. We are creatures of suggestion, suspicion and surmise. We can't help it. Some of us are more than others.

Those documents—that document there of Mr. Campbell has been placed before you solely for the purpose of showing the intent of the defendants. Now, I have shown you that there is no evidence in this case, in the first place, to support the charges that are made."

Now you didn't mean charges that were made in the indictment, you meant charges that were made in the letter of Dean [727] Campbell.

Mr. Lawson: That would seem to follow, your Honor—I agree that that is true,—but I, of course, didn't intend to open up the matter for discussion. I intended to have it limited to its original purpose, and if the Court will give me an opportunity to reply to Mr. Campbell, I would certainly delight to do that. If he wants to make that an issue in the case, I would like to reply.

The Court: I think you have made it, if it is made at all, and anything that Mr. Campbell may say with regard to the document known as the audit report of Dean Campbell with regard to the statements in that shall not make them in any way evidence.

As I understand it, counsel is simply attempting now, by argument, to show the inaccuracy of Mr. Irwin's statement that there is nothing in the record to substantiate the statements made in the audit report.

Mr. Campbell: That is right, but Mr. Lawson's statement.

The Court: I see no impropriety in that.

Mr. Campbell: You stated Mr. Irwin's statement. You meant Mr. Lawson's statement.

The Court: Yes.

Mr. Irwin: May I address the Court? I feel I would be derelict if I did not interpose an objection to any comment of counsel occasioned by the remark of other defense counsel as going outside the limited purpose for which certain evidence was received.

The Court: I can't see under what theory of law counsel would be prevented from discussing the evidence, whether Mr. Lawson had raised the issue or not, provided the jury understands that he is not trying to show that the statements in this audit report were true or were false. If you disconnect this in your [728] minds entirely from those statements, then I think there will be no danger.

To attempt to prove directly that any of these

statements in the audit report were true, considering it as a piece of evidence, would be improper. But I see no impropriety of counsel going on and arguing to the jury and showing to the jury anything that is properly in evidence. If it is restricted he must stick to the restriction.

Mr. Irwin: May we ask for an exception as to that?

Mr. Lawson: Yes, your Honor.

Mr. Campbell: As I stated, I am addressing myself to Mr. Lawson's assertion to you with reference to Campbell's report, Government's Exhibit 46, wherein he states 'Now I have shown you that there is no evidence in this case in the first place to support the charges that are there made.'

Now bearing in mind, gentlemen, that this document, and the comments that it makes herein, are not evidence of the truth or falsity of what they state, but let us read these statements and then let us look elsewhere in the record.

Mr. Irwin: That is my objection, your Honor.

The Court: I don't think I will permit you to do that.

Mr. Campbell: I will withdraw that last statement, your Honor.

The Court: If you will just lay that audit report aside and go ahead and show anything else you want to with regard to the evidence, disconnected from the statements contained in that audit report, then I think there will not be the slightest impropriety in it.

Mr. Campbell: Yes, but I think, if the Court

please, in view of the reference made to this report by Mr. Lawson, I am entitled to refresh the jury's memory as to the contents of the report. [729]

The Court: Well, you have a perfect right to read that report so long as the jury understands that it is in evidence here only for the purpose of showing intent.

Mr. Campbell: I understand that.

Gentlemen, I am going to refer you to this Exhibit 46, which is here only for the purpose of intent, limited to the defendants Edgerton, Ireland, Smale, Thomas, and Starr, and not as proof of the truth or falsity of anything contained in the report. I wish to read from it:

> 'Possibly the matter of most importance to the Directors should be the prime question of whether or not the company in its entirety is fraudulent. These specific points should be considered by the Directors with the idea of applying constructive remedy if (1) the Investment Finance Co. is a fraud, and (2) if any remedy be available. Certain hypothetical questions are set forth for your consideration.
>
> The questions propounded are based on the unquestioned fact that (1) control and ownership of this company and the First Security Deposit Corporation are so closely interlaced as to appear identical in effect (see Schedules V, VI, and VII); (2) profits which might accrue to the First Security Deposit Corporation would be diverted to the narrower limits of the fewer shareholders of the Investment Finance

> Co., to the loss of shareholders in the former company; and (3) funds used to promote the various enterprises were basically the funds of the First Security Deposit Corporation."

Now, referring to that document, Mr. Lawson has said:

> 'I have shown you that there is no evidence [730] in this case in the first place to support the charges that are made.'

Now, gentlemen, we have shown you, and Mr. Lawson frankly admitted it, that the defendants had and maintained control of these corporations, including the First Security Deposit Corporation and the Investment Finance Company.

Our evidence has shown you that funds—first, that funds were lent from the First Security Deposit Corporation to the narrower limits—narrower stockholder limits, narrower stock interest limits—of the Investment Finance Company and we have shown you here that those funds were used by the Investment Finance Company to obtain a profit for that company on bond transactions to the loss of the shareholders of the First Security Deposit Corporation. So much for Mr. Lawson's statement.

Mr. Irwin: Your Honor, I assign that last comment by counsel, since he has finished reading, as a direct violation of your Honor's admonition that he is not to comment on the truth or falsity of the statement.

Mr. Lawson: In which we join also, your Honor.

The Court: The exception will be disallowed.

[731]

INSTRUCTIONS TO THE JURY

The Court: Gentlemen of the jury, it now becomes my privilege and obligation to instruct you as to the law involved in this case. Under the Federal practice, the judge is permitted to comment on the facts of the case. You must understand, however, that such comments are mere matters of opinion which you, the jury, may disregard, if such comments conflict with your own conclusions. The reason for this is that the jurors are the sole and exclusive judges of the facts. I shall leave the determination of the facts in this case to you; being satisfied, as I am, that you are fully capable of determining them without any particular comment from me. Where I have at any time during the trial interrupted a witness or an attorney or have made a voluntary statement, indicating that there seemed to be some confusion or some contradiction or lack of clarity in the testimony being received, I have done so only to permit a witness to straighten out the matter; and you are not to infer from any such interruption or statement that I have doubted the truth or accuracy of the witness' testimony. It has been my purpose merely to be sure, and to have you be sure, of the testimony. Whenever I have attempted, and whenever I may in these instructions attempt, to recite or to summarize or to state what a witness has said, I am only giving my recollection of the testimony and, insofar as my recollection does not accord with yours, you must act upon your own recollection and not upon the Court's.

However, it is the exclusive province of the judge to instruct you as to the law applicable to the case, in order that you may render a general verdict upon the facts as the same are found by you and upon the law as given to you by me in these instructions. It would be a violation of your duty [732] for you to attempt to determine the law or to base a verdict upon any other view or interpretation of the law than that given you by the Court —a wrong for which the parties would have no remedy, because it is conclusively presumed by the Court and all higher tribunals that you have acted in accordance with the Court's instructions, and you have been sworn so to do.

One of the most fundamental principles of the American judicial system is that persons are equal before the law, and no one is above the law. You should bear this in mind, when applying the legal principles enunciated in these instructions, in determining the guilt or innocence of any defendant or defendants on trial. You are here for the purpose of trying the issues of fact that are presented by the allegations in the indictment, as limited by the bill of particulars insofar as the defendant Twombly is concerned, and the plea of the defendants to the indictment.

Repetition, if it occurs—and I am satisfied that it will occur because the instructions prepared by me will be supplemented by suggestions from plaintiff and defendants' counsel—does not indicate that any one matter is of greater importance than another. All rejected instructions or all requested

instructions and all objections to proposed instructions which have not been presented in a timely manner and in the form, with citations of authority, as prescribed by law or by the rules or the order of the Court, are hereby rejected.

You should not consider as evidence any argument, statement or comment or attempted legal interpretation made by counsel during the trial, unless such statement is made as an admission or stipulation conceding the existence of a fact or facts. [733] Such statements, arguments, comments or suggestions are not evidence and must not be considered as such by you. You must not consider, for any purpose, any evidence offered and rejected, or which has been stricken out by the Court; such evidence is to be treated as though you had never heard it. You are to consider evidence, which has been limited in scope or application by order of the Court, only for the particular or limited purpose for which it was admitted by the Court. You are to decide this case solely upon the evidence which has been introduced before you and the inferences which you may deduce therefrom as indicated in these instructions, and upon the law as given you in these instructions.

The law does not require any defendant to prove his innocence, which, in many cases, might be impossible, but, on the contrary, the law requires the plaintiff to establish his guilt by legal evidence beyond a reasonable doubt.

The presumption of innocence goes with each defendant throughout the whole trial, even till the verdict is rendered, and this presumption of innocence outweighs and overbalances all suspicions and suppositions, and can only be destroyed by proof beyond a reasonable doubt.

You are instructed that the presumption of innocence, with which each defendant is at all times clothed, is not a mere form to be disregarded by you at your pleasure, but that it is an essential, substantial part of the law and binding upon you in this case, and it is your duty to give the defendants the full benefit of this presumption, and to acquit these defendants, and each of them, unless the evidence in the case convinces you of their guilt as charged beyond all reasonable doubt.

A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an [734] impartial comparison and consideration of all the evidence, or from a want of sufficient evidence on behalf of the plaintiff to convince you of the truth of the charge, you can candidly say that you are not satisfied of a defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence you can truthfully say that you have an abiding conviction of a defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

By such reasonable doubt you are not to understand that all doubt is to be excluded; it is impos-

sible in the determination of these questions to be absolutely certain. You are required to decide the question submitted to you upon the strong probabilities of the case, and to justify a conviction the probabilities must be so strong as not to exclude all doubt or possibility of error, but so as to exclude reasonable doubt.

When, after weighing all the evidence, you have an abiding conviction and belief that a defendant is guilty, it is your duty to convict, and no sympathy justifies you in seeking for any doubts by any strained or unreasonable construction or interpretation of evidence or facts.

Reasonable doubt is not a mere possible doubt; because everything relating to human affairs, and depending on mortal evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

Now in judging of the evidence, you are to give it a [735] reasonable and fair construction, and you are not authorized, because of any feeling of sympathy or other bias, to apply a strained construction, one that is unreasonable, in order to justify a certain verdict when, were it not for such feeling or bias, you would reach a contrary conclusion. And, whenever, after a careful consideration of all of the evidence, your minds are in that state where a conclusion of innocence is indicated equally with

a conclusion of guilt, or there is a reasonable doubt as to whether the evidence is so balanced, the conclusion of innocence must be adopted.

You are instructed that if there are any matters of fact which are left unanswered by the evidence, they cannot be made certain to the prejudice of any defendant by inference. In the absence of evidence, no inference can be drawn by the jury against any defendant; but on the contrary, all the inferences and presumptions consistent with the fact proved are to be drawn in favor of innocence. No fact or circumstance upon which you may base a conclusion of guilt is sufficient, unless such fact or circumstance has been proved beyond a reasonable doubt and to the same extent as though the whole conclusion depended upon one fact or circumstance.

You are the sole judges of the credibility and the weight which is to be given to the witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by evidence affecting his character for truth, honesty and integrity or his motives; or by contradictory evidence. In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men. You should [736] carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his

demeanor, his manner while on the stand, his intelligence, the relations which he bears to the plaintiff or to a defendant, the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility. If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony. You must understand that you are governed by the answers only and not by any inference from the questions which may have been propounded.

You are not limited in your consideration of the evidence to the bald expressions of the witnesses; you are authorized to draw such inferences from the facts and circumstances which you find have been proved as seem justified in the light of your experience as reasonable men.

Now there is nothing peculiarly different in the way a juror is to consider the proof in a criminal case from that by which men give their attention to any question depending upon evidence presented to them. You are expected to use your good sense, consider the evidence for the purposes only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains

the plaintiff is entitled to a verdict. Jurors are expected to agree upon a verdict where they can conscientiously do so; you are expected [737] to consult with one another in the jury room and any juror should not hesitate to abandon his own view when convinced that it is erroneous.

Before you would be justified in convicting the defendants, or any of them, the facts or circumstances must not only be entirely consistent with the theory of guilt, but must be inconsistent with any other rational conclusion, and if two opposing conclusions can with equal propriety be drawn from the evidence, one consistent with guilt, the other consistent with innocence, the latter should be adopted, and you should acquit the defendants, and if you have any reasonable doubt as to which of the two opposing results a chain of circumstances leads, then if one of those results is reasonably consistent with the defendant's innocence, your verdict should be not guilty.

Your personal opinion as to facts not proved cannot in any manner be considered or used by you as the basis of your verdict. As jurors, you can only act upon the evidence introduced upon this trial and, from that evidence and under the instruction of the Court, you must form your verdict unaided, unassisted and uninfluenced by any opinion or belief that you may have which is not based upon that testimony.

You are instructed that the defendants are on trial for the crimes charged in the indictment, as I have previously indicated, and for no others.

In determining the guilt or innocence of each defendant, you must weigh the evidence as against that defendant carefully and must have clearly in mind those portions of the testimony which directly connect that defendant with the commission of the offense complained of. Unless you are able to say that the evidence directly connecting such defendant with such offense demonstrates beyond a reasonable [738] doubt that such defendant committed such offense, then you are bound under your oaths to find such defendant not guilty.

A reasonable doubt which justifies the acquittal of the defendants need not be established affirmatively by the evidence in the case. The true rule is that the defendants should be acquitted unless it clearly appears that a reasonable doubt has been affirmatively excluded by the evidence introduced. A reasonable doubt may arise from the want of evidence as well as from the evidence; and a reasonable doubt may arise also from the nature and character of the evidence introduced, if the minds of the jurors are not convinced, because of the nature and character of the evidence, of the truth of the allegations required to be proved in order to warrant a conviction.

Each defendant in this case is entitled to the independent judgment of each and every juryman who has been selected to try the defendants. Twelve men constitute a jury under the law, and no man may be convicted of an offense unless the judgment of each and all of said twelve men shall concur in the conviction, unless by a stipulation

there has been an agreement that less than twelve may arrive at a verdict, which is the case here. It has been stipulated that eleven of you will act just as though twelve had been on the jury panel, and you must concur unanimously in your verdict as to each defendant.

A plea of not guilty is a denial of each and every fact alleged in the indictment. The law does not require of the defendant to take the stand, or to produce evidence to support his denial. Each defendant may rely upon his denial and the presumption of innocence, and it then becomes the burden of the plaintiff, as I have heretofore explained to you, to [739] satisfy you by evidence of the defendant's guilt beyond a reasonable doubt.

Now, gentlemen, there are two kinds or classes of evidence recognized and admitted in courts of justice, particularly in the federal courts, upon either of which jurors may return a verdict. One is known as direct evidence.

Direct evidence is that which proves the fact in dispute directly, without any inference or presumption, and which in itself, if true, conclusively establishes that fact. The testimony of eye witnesses to the commission of an offense is evidence of this character.

The other class of evidence, that is, indirect evidence, is what is quite frequently referred to as circumstantial evidence.

Indirect evidence, or circumstantial evidence, is that which tends to establish the fact in dispute by proving another and which, though true, does not

of itself conclusively establish that fact but which affords an inference of its existence. Such evidence may consist of statements made by a defendant, plans laid for the commission of a crime—in short, any acts, declarations or circumstances admitted in evidence tending to establish the offense charged and to connect the defendant with its commission. For example, a witness testifies to an admission of a party to a fact in dispute. This tends to prove a fact from which the fact in dispute may be inferred.

Now, to warrant a conviction on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt, and all the facts necessary to such conclusion must be consistent with each other and with the main fact sought to be proved; and the circumstances taken together must be [740] of a conclusive nature, leading on the whole to a satisfactory conclusion and producing a reasonable and moral certainty that the accused committed the offense charged.

If, upon consideration of the whole case, you are satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the defendants, you should so find, irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence, or by a combination of both; and so also a conviction upon circumstantial evidence would not be authorized if the proof were less satisfactory to the minds of the jury than it would be by direct evidence. The law makes no

distinction between circumstantial evidence and direct evidence in the degree of proof required for conviction but only requires that the jury shall be satisfied beyond a reasonable doubt by evidence of either the one character or the other, or both.

While you may show what a man does by direct evidence of eye witnesses, the only way you can show what he intends and believes or what his plans are or what he has devised or what his purpose is or was, is by circumstantial evidence, ordinarily. The indictment charges that the defendants had devised a described scheme for obtaining money and property by means of false and fraudulent representations, pretenses and promises. Such a fraudulent scheme can only be found by a jury, ordinarily, by circumstantial evidence. And all of these instructions, as to circumstantial evidence, have equal application to each of the counts of the indictment, including the conspiracy count, which will be particularly discussed later.

Now unless otherwise indicated or directed by the Court, you will apply the instructions of the Court to the case of each separate defendant, regardless of whether the separate [741] names are expressed therein.

There are certain general statements which I wish to make to you, gentlemen of the jury, with regard to some of these matters which have been discussed in the testimony or in the argument of counsel. You must understand, of course, that an act innocuous in itself and perfectly legal may become illegal be-

cause it is tainted with some type of fraud or misrepresentation.

Now the acts and dealings of a corporation, as indicated in its books and records, are presumed to be legal. A California corporation has a right to buy at a discount bonds previously issued by it, provided, of course, as I have said, there is no fraud involved in the transaction. Generally speaking, a corporation also has the right, subject to substantially the same limitation, to buy its capital stock. A corporation is an entity distinct from its stockholders. The stockholders have no estate in the assets of the corporation. Those assets are owned by the corporation. The par value of a corporation's shares is merely the value per share indicated on the face of the stock certificate, as provided in its articles of incorporation, and this par value is not a true indication of the actual value of the shares. Actual value, for all practical purposes, is the price at which the assets of the corporation might be sold, without forcing, less the cost of selling and less corporate obligations or liabilities other than capital stock liability. Book value of capital stock merely expresses the net asset value of the shares as carried on the books of the corporation.

The market value of an article or piece of property is usually considered to be the price which it might be expected to bring if offered for sale in a fair market; not the price which might be obtained on a sale at public auction or a [742] sale forced by the necessities of the owner, but such a

sale as would be fixed by negotiation and mutual agreement after ample time to find a purchaser as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy, but is not compelled to take the particular article or piece of property. That well-recognized definition is, I think, equally applicable to shares of stock. Many times, however, shares of stock are of such a character that they are freely dealt in on one of our exchanges, or what we call stock markets. Then the price at which the stock is being currently and openly sold is usually considered to indicate the market value. So we may say that market price would be the actual price at which shares are currently sold, or have recently been sold, in an open market, not forced, but in the usual and ordinary course of trade and competition between sellers and buyers equally free to bargain, as established by records of current sales. Shares of stock or any other property may have, of course, a speculative value, which is a value dependent upon future contingencies. These same definitions would apply to bonds or other articles of value, as well as stocks.

The holder of a secured bond is a secured creditor of the corporation which issues the bonds. The holder of an unsecured bond, sometimes called a debenture, is an unsecured creditor. Corporations are ordinarily controlled by ownership of shares or by the holding and presentation of proxies to vote those shares issued by the registered owners thereof, or by both. The power of directors must be exercised for the benefit of the shareholders, and not

for the benefit of the directors or of the promoters or of some favored few. Directors are fiduciaries, but are not, strictly, trustees. The fiduciary duty, however, is not relaxed to the extent that a [743] director may obtain any unfair advantage or profit for himself by misrepresentation, concealment, or by any type of fraud. Dealings between corporations having directors in common are not presumptively illegal. Illegality depends upon what was done and how it was done; whether or not there was fraud in the transaction. The same thing is ordinarily true in dealings between a director and an officer or directors and officers and its corporation or its shareholders or bondholders. The transaction may be entirely legal or if there be fraud involved then it may be illegal.

There is no legal presumption that an officer, director, stockholder or manager of a corporation is fully informed as to, or even familiar with, the entries in books of account were kept under his instruction, direction or supervision. You may, however, find from the evidence that any such person had, in fact, knowledge of certain entries in the books of account. The fact that Mr. Twombly was working on the books of a corporation as an auditor does not, in itself, prove that he was familiar with all or any particular entries therein.

A director or other officer of a corporation has a legal right to rely upon the correctness of any audit

report, financial statement or report of similar character, provided he, in good faith, so relies.

Books and records which were properly admitted into evidence and were clearly applicable to the case of one defendant must actually be connected with the other defendants in some sufficient manner or through a finding that the other defendants were co-conspirators with such defendant, before books and records could properly be applicable to the remaining defendants and their causes. [744]

You are instructed that a large number, not all, of the bonds issued by the First Security Deposit Corporation matured on November 1, 1942, and that under the trust indenture issued in connection therewith, the date of payment of these bonds might be deferred for an additional period of 22 months under certain conditions and with certain results as indicated in that trust indenture.

The common shares of the First Security Deposit Corporation were issued as shares having no par value. However, if I remember the testimony correctly, an arbitrary value was given by a vote of the directors to the shares of $5.00, $1.00 being charged to capital and $4.00 set up as capital surplus.

Now, gentlemen, as I have said, the defendants are not on trial for any offense not charged in the indictment, and let us first look at the charges. Most, if not all, of the paragraphs and phrases of the indictment have been heretofore read to you or discussed before you and, inasmuch as the in-

dictment will be sent to the jury room with you, by consent of all defendants and counsel, I shall not attempt other than a general summary of the charges except in special instances.

May it be stipulated that a copy of the indictment may be given to the bailiff to take to the jury room?

Mr. Lawson: So stipulated.

Mr. Butler: So stipulated.

Mr. Campbell: So stipulated.

Mr. Irwin: So stipulated.

Mr. Adams: So stipulated.

The Court: That will save us a lot of time.

Now count 3 of the indictment has been dismissed by the plaintiff and you are to ignore it.

Without going into detail, but for reasons which the [745] Court deems sufficient, I hereby direct you to bring in a verdict of not guilty as to each and all of the defendants upon Count 10 of the indictment.

The motion to strike Exhibit 155, being sometimes referred to as the count letter in Count 10 of the indictment, is granted insofar as concerns all of the defendants except the defendant Twombly. You are instructed that your consideration of the guilt or innocence of any of the defendants other than the defendant Twombly must be predicated upon other evidence and this letter must be entirely disregarded.

Now as to the defendant Twombly, you must first consider whether or not that letter is signed by him, and in that connection you may examine other

admitted signatures in the record. If you should determine that the signature is not that of the defendant Twombly, you must entirely reject Exhibit 155 as an item of evidence. If, however, you determine that the signature is genuine, then, and only then, you may consider that letter as evidence, but, even then, only as an item in determining the intent of the defendant Twombly. I have already limited in like manner other items of evidence and I feel sure no further instructions are necessary as to this limitation.

I instruct the Clerk to hand to the bailiff that letter to take with you in order that you may consider it.

Now Counts 1 and 2 and Counts 4, 5, 6, 7, 8, 9, Counts 11, 12, 13, and 14, are what we shall hereafter refer to, for convenience, as the substantive counts or the mail fraud counts. I sometimes may carelessly say 'the first 14 counts.' If I say 'the first 14 counts' I mean with counts 3 and 10 omitted.

Count 15 is what we shall, for convenience, describe as the conspiracy count. All of the general instructions which [746] I have heretofore given you are applicable to and should be considered by you in connection with each and every count of the indictment.

Now I want to explain to you that under our system of jurisprudence a defendant has a right to come into court and say, 'I don't think this indictment particularizes enough so that I know just

what I am charged with, and I want the plaintiff to tell me with particularity what I am charged with.'

A hearing on the requests of the defendant is had in court, and was had in this case as to the defendant Twombly. The Court listens to the presentation of the matter and he finally decided, in this case, as is customary, that certain matters were not sufficiently carefully described in the indictment as to the defendant Twombly and required the plaintiff to furnish to him and file in this court what we call a bill of particulars.

Now there is nothing esoteric about any of these proceedings and the effect of this bill of particulars is to limit the plaintiff insofar as the charges in the indictment are concerned by the statements in the bill of particulars. The bill of particulars can't expand the indictment but it can and does limit it.

Now I think before we proceed further we ought to run over some of these items in the bill of particulars.

Now there was a request made, which we will describe, for convenience, as request 1, by the defendant Twombly through his counsel, and in ruling upon that request the Court said:

> 'Defendant Twombly is entitled to know what acts of his occurring subsequent to his disassociation with the corporations involved the plaintiff [747] contends are criminally chargeable against him under the indictment.'

Now that is acts subsequent to his disassociation. The plaintiff answered that in this way:

'The plaintiff does not contend that the defendant Twombly is chargeable with any criminal acts as set forth in the indictment after he severed his connection with the corporations referred to in the indictment on or about December 21, 1938.'

Now during the progress of this trial there have been proper objections made to the introduction of evidence by Mr. Twombly's counsel on the ground that they were not applicable to or binding upon him under the indictment as limited by this bill of particulars, and those requests have been granted. I can't go through several weeks of testimony and pick out every little item of testimony that had to do with acts or declarations subsequent to the 21st day of December, 1938, and I shan't attempt to; all I say is that if, by any chance, any of that got into evidence, disregard it. Take it out of your minds. The defendant Twombly is not charged by the plaintiff with responsibility for any criminal acts of any of the defendants after that date.

Now the next request granted by the Court was in this form:

'The defendant Twombly is also entitled to know what acts of the other defendants constituting part of the scheme to defraud which took place prior to Twombly's association with them are criminally chargeable against him.'

The answer to that is as follows:

'The plaintiff states that on or about [748] September 19, 1932, application was made by

First Security Deposit Corporation to the Commissioner of Corporations of the State of California for permission to issue bonds and stock of the said First Security Deposit Corporation and in connection therewith stated in substance that money of the First Security Deposit Corporation would only be loaned or advanced upon security or properties * * *'

I shall disregard the balance as surplusage.

'The said application was signed by the defendant R. W. Starr. This representation was made to all of the certificate holders of the Railway Mutual Building and Loan Association who subsequently became bondholders and stockholders of the First Security Deposit Corporation.'

The third:

'The approximate dates within which it is claimed the defendant Twombly was associated in the wrongdoing should be indicated.'

The answer to that by the plaintiff was:

'The defendant Twombly became general manager of the First Security Deposit Corporation on or about November 1, 1934, and severed his connection with the said corporation on or about December 21, 1938.'

The next request was in connection with the allegation in the indictment:

'That at all times from and after the dates of organization of such First Security Mort-

gage Corporation, First Security Deposit Corporation, [749] R. F. D. Discount Company, Inc., Consolidated Investors, and Investment Finance Company, the defendants obtained, maintained, and exercised complete control thereof:'

The Court ruled that the manner by which the plaintiff contends the defendant Twombly joined with the other defendants in securing and exercising control of the corporations or any of them referred to in the indictment is as follows:

'As to First Security Deposit Corporation, the defendant Twombly was general manager from on or about November 1, 1934, to on or about September 21, 1938. He was also secretary of the First Security Deposit Corporation from on or about November 21, 1934, to on or about September 21, 1938. He was also a director of said corporation from on or about December 1, 1934, to on or about December 21, 1938. He was also a member of the executive committee of the said corporation from on or about February 19, 1936, to on or about September 1, 1938.

As to the Investment Finance Company, he was secretary from on or about September 5, 1935, to on or about September 21, 1938. He was treasurer from on or about September 5, 1935, to on or about March 7, 1939. He was general manager to on or about September 21, 1938. He was a member of the board of di-

rectors from on or about September 5, 1935, to on or about December 21, 1938.

The plaintiff does not contend that the defendant Twombly exercised control over either First Security Mortgage Corporation, R. F. D. [750] Discount Company, Inc., or Consolidated Investors.' Then the plaintiff, in answer to request, states:

'* * * as of August 18, 1937, the defendant Twombly owned 260 shares of stock of Investment Finance Company. The defendant Twombly acquired 10 shares on or about October 5, 1935, for which he paid $10 a share. He acquired 10 shares on July 6, 1936, for which he paid $10 a share. He acquired 240 shares on December 30, 1936, for which he paid $240 in cash.'

Now I have waited to explain to you until after I had indicated what was in this bill of particulars that you weren't to consider these statements by the plaintiff as evidence or as proof in any way of the correctness of those allegations. These statements in the bill of particulars simply limit what is charged in the indictment and they are no more proof than the charges in the indictment itself. The only thing they do is limit it.

Then it says:

'That thereafter and for the purpose of and pursuant to the said scheme and artifice to defraud the said persons intended to be defrauded, and on or about the 28th day of De-

cember, 1936, the said defendants sold and caused to be sold the assets of the said Consolidated Investors to the said Investment Finance Company;'

And I ruled that they were entitled to know in what manner those assets were sold by Twombly, either by him or in association with others.

The answer is:

'The plaintiff states that with reference to (that) item that on or about November 9, 1936, [751] defendants R. W. Starr, J. Howard Edgerton, E. C. Thomas, C. W. Twombly, and J. L. Smale attended a meeting of the board of directors of the Investment Finance Company, at which time the following resolution was adopted.'

This I shan't read to you because you will have the minute book before you.

Then the Court ruled that the defendant Twombly was entitled to be told the method by which the plaintiff contends he joined with other defendants in securing and exercising control over those corporations, and the plaintiff stated that:

'* * * it contends the defendant Twombly joined with other defendants in securing and exercising control of the corporations or any of them referred to in the indictment as follows:

As to First Security Deposit Corporation, the defendant Twombly was general manager from on or about November 1, 1934, to on or

about September 21, 1938. He was also secretary of the First Security Deposit Corporation from on or about November 21, 1934, to on or about September 21, 1938. He was also a director of said corporation from on or about December 1, 1934, to on or about December 21, 1938. He was a member of the executive committee of the said corporation from on or about February 19, 1936, to on or about September 21, 1938.

As to the Investment Finance Company he was secretary from on or about September 5, 1935, to on or about September 21, 1938. He [752] was treasurer from on or about September 5, 1935, to on or about March 7, 1939. He was general manager to on or about September 21, 1938. He was a member of the board of directors from on or about September 5, 1935, to on or about December 21, 1938.'

Then there is a charge in the indictment:

'That the defendants did depress and cause to be depressed the market price of the said securities of First Security Deposit Corporation so that defendants might and did acquire the same from the persons intended to be defrauded at prices greatly reduced from the par value thereof, directly or through the agency of one or more of said companies and through the agency of companies whose names are to the grand jurors unknown, and with funds which belonged to and were feloniously and unlawfully withheld and diverted from said persons intended to be defrauded;'

I ruled that the defendant Twombly in that connection was entitled to know how and in what way it was contended that he alone had jointly with the others caused to be depressed any of the securities of the First Security Deposit Corporation, the names of the agents who participated and the actual value of the securities depressed, the amounts withheld, the disclosure of the method by which it was contended Twombly employed to divert the funds to his own use.

Now the plaintiff stated, with reference to that—they referred to the letter to Bidleman, set forth in Count 1 of the indictment, the letter to Benn in count 2, the letter to Morse in count 4, the letter to Winston in count 5, to Taylor in count 6, the letter to Kate Orwall in count 7, the letter [753] to Morse in count 8, the letter to Bidleman in count 9, the letter to Benn under date of October 24, 1938, in count 11, the letter to Morse in count 12, the letter to Taylor in count 13, the letter to Mrs. Talamantes in count 14, the letter to Dennis Taylor, which is overt act 25 of count 15, the check to Mary Wiseley, which is overt act 27 of count 15, a check to Hicks which is overt act 30 of count 15, a check to Kidder which is overt act 37 in count 15, a telegram to Bidleman which is overt act 38 of count 15, letter of March 30, 1937, addressed to Grace Bidleman or Leland H. Bidleman, letter of December 5, 1936, addressed to Hattie R. Geddes, letter of October 8, 1937, addressed to Fred O. Morse, letter of November 1, 1937, addressed to Morse, letter of December 31, 1937, addressed to Morse, letter of

April 19, 1938, addressed to Morse, letter of October 11, 1937, addressed to Mrs. Wright, letter of November 29, 1937, addressed to Mrs. Wright, letter of May 16, 1938, addressed to Mrs. Orwall, letter of July 17, 1937, received by Hattie R. Geddes for the estate of Guy E. Smith.

'That in depressing and attempting to depress the market price of securities of the First Security Deposit Corporation the following corporations and individuals were used:

Charles Lee Cronk,

Investment Finance Company,

Battelle, Dwyer & Company,

Seaboard National Bank, Wilshire and La Brea Branch,

Bank of America, Dunsmuir and Wilshire Branch.

The actual value of the bonds'——

I call your attention to that word 'depressed was the face value of the bonds plus interest accrued to date of ac- [754] quisition by Investment Finance Company. With reference to the value of the bonds depressed the approximate actual value was $267,-453.65 and the amount withheld was approximately $97,628.66.'

Now, gentlemen, by their limiting their charges in the bill of particulars to the value of bonds depressed, you are to consider that there is no charge under that clause of the indictment of depressing the market as to any other security than bonds, so far as the defendant Twombly is concerned.

He goes on to say:

'That the defendant Twombly having been an officer and director of certain of the corporations mentioned aided in bringing about the loans from First Security Deposit Corporation to Investment Finance Company of great sums of money; that as an officer of Investment Finance Company he aided in bringing about the acquisition of the assets of Consolidated Investors by Investment Finance Company; that he was the owner of 260 shares of stock of Investment Finance Company; that during the time that he was either general manager, director, or officer of the First Security Deposit Corporation or Investment Finance Company he took part in the transactions between the First Security Deposit Corporation and Investment Finance Company wherein large sums of money borrowed from First Security Deposit Corporation by Investment Finance Company were invested in private enterprises in which he was personally interested.'

Then in connection with that count of the indictment which he said: [755]

'That the defendants, under the pretense of loans, and by divers other ways to the grand jurors unknown, did convert and divert to their own use, benefit and profit large sums of money and property of the said First Security Deposit Corporation and of the persons intended to be defrauded;'

The Court stated that the plaintiff should state what were the divers other ways by which the defendant Twombly did these acts, either alone or with others.

The answer is:

> ' * * * that the divers other ways in which defendant Twombly converted money or property of the First Security Deposit Corporation consisted of the transfer of approximately seven pieces of real estate to the Investment Finance Company between the dates of June 15, 1936, and January 7, 1937, in exchange for collateral trust bonds of the First Security Deposit Corporation, which real estate was subsequently sold at a profit by the Investment Finance Company. Between the dates of November 1, 1938, and March 24, 1939, approximately 37 first trust deeds were transferred from the First Security Deposit Corporation to the Investment Finance Company in exchange for collateral trust bonds of the First Security Deposit Corporation, plus accrued interest, which deeds were subsequently sold by the Investment Finance Company at face value, Investment Finance Company thus realizing a profit in the transaction over the cost of the bonds to the Investment Finance Company.'

Then in connection with the allegation: [756]

> 'That * * * said First Security Deposit Corporation was organized for the purpose of and was duly and actively engaged in the liquidation of the said assets received by it from the Railway

> Mutual Building and Loan Association; whereas in truth and in fact the defendants, and each of them, then and there well knew that no such liquidation was in fact being carried into effect * * * '

The Court indicated that the plaintiff should state how, upon what date, in what manner, the defendant Twombly represented and pretended that this liquidation was taking place.

In answer to that the plaintiff refers to counts 1 and 9 of the indictment and overt acts of count 15 of the indictment numbers 20 and 25, and sets forth the letters which are there indicated. And then states:

> 'The plaintiff will refer to approximately 36 letters, written at Los Angeles and addressed to the following persons upon the following dates, the representations contained therein being the same as in the letters referred to in overt act No. 25 of Count 15 of the indictment, said overt act being a letter dated January 26, 1938, addressed to Mr. Dennis S. Taylor * * * ' with the exception of the name of the person or persons addressed, the date of January 26, 1938, and amount of the securities involved and the amount that they were offered for same:'

Then follows a long list of names of letters, the only material ones of which have been introduced in evidence here and are already before you for consideration.

I have already told you that I would strike out a

certain [757] portion of the allegation which is in the indictment, being the first paragraph thereof of page 5. I strike out that portion which says:

> ' * * * therefore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California * * * '

I shall refer to that later. But I held that the plaintiff should state when, if at any time, the defendant Twombly had any knowledge concerning any requirement, if any, for such types of investment and furnish the same information as regards the other defendants and each of them.

I granted the request as to Twombly and the bill of particulars states:

> ' * * * that the defendants R. W. Starr, E. C. Thomas, R. L. Smale, and A. R. Ireland were officers or directors of First Security Deposit Corporation at the time application was made to the Commissioner of Corporations of the State of California for permit to issue bonds and stock of First Security Deposit Corporation; that the application was signed by defendant R. W. Starr as president of the corporation and filed on or about September 19, 1932. Each of the certificate holders of Railway Mutual Building and Loan Association who converted his or her certificates or shares into stocks and bonds of First Security Deposit Corporation signed a pledge and agreement for reorganization of Railway Mutual Building and Loan Association. As

a part of the application the manner in which the funds of First Security Deposit Corporation would be loaned or advanced [758] was set forth. The defendant Edgerton became attorney for First Security Deposit Corporation in March of 1933; that defendant Edgerton attended a meeting of the board of directors of Railway Mutual Building and Loan Association on September 25, 1933, at which time and place the plan and agreement for reorganization of the Railway Mutual Building and Loan Association was approved.'

Then in connection with the paragraph in the indictment with regard to representations, I directed the plaintiff to state what representations, pretenses, and promises were made by the defendant Twombly, to what specific person and upon what specific dates, and the plaintiff states as follows:

'The plaintiff states with reference to (this) item that the defendant Twombly made the representations, pretenses, and promises set forth in * * * a letter to Grace Bidleman or Leland H. Bidleman * * * ; a letter dated December 5, 1936, to Hattie R. Geddes * * * ' copies of which letters are attached hereto and made a part of this bill.'

And which have been introduced in evidence.

That in addition to the representations appearing on the face of the letters to which reference was had above, it is the position of the plaintiff that the defendant Twombly by and through the other defend-

ants herein made all of the representations as set forth in the indictment herein continuously between the dates of on or about September 19, 1932, and December 21, 1938, to the persons named in the indictment as those persons to be defrauded both by means of letters, advertisements, and oral statements; that the defendant Twombly orally represented in substance to Hattie R. Geddes at Los [759] Angeles, California, during November 1937 that the offer of 70 per cent for her bonds would not be good for long; that the First Security Deposit Corporation was going into other hands; that any offer for her bonds made later would not be as good as this one; that the First Security Deposit Corporation was waiting word from the Building and Loan Commissioner which would adversely affect the company; that he was offering absolutely the best price he could; that he could not make any offer of cash at a later date.

Now, gentlemen, I want again to caution you that these allegations in this bill of particulars are no more proof than allegations in the indictment; they are just meant by way of limitation and I have felt that I should indicate what those were.

The mail fraud counts, being counts 1 to 14 of the indictment, excluding 3 and 10, accuse the defendants of using the United States mails in execution of a scheme to defraud, which scheme, it is alleged, they had devised in violation of the United States statute (18 USC, Sec. 338) which provides (and I am paraphrasing the section for brevity) that 'whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or prop-

erty by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any persons residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, [760] whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be punished' as indicated in the section.

Section 550 of 18 USC provides:

> 'Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.'

You will note the words, in Section 338, 'any scheme or artifice to defraud.' It is not necessary to the offense charged in these counts that anyone be actually defrauded, that is, it is not necessary to such offense that the scheme to defraud be successfully executed. The expression used in the statute, 'devise any scheme or artifice to defraud,' is about as plain

as it can be made. 'Devise' means to form or contrive. A man devises a scheme when he forms a plan. He devises an artifice when he forms a crafty, tricky, plan. A man who adopts, and makes his own, a scheme or artifice to defraud, devised by others within the meaning of the law, thereby himself devised such scheme or artifice. In each count of the indictment the defendants are alleged to have knowingly and willfully done the acts and things of which they are accused. As so used, the word 'willfully' means with an evil intent or purpose. Such evil intent or purpose is an essential element of the offenses of which the defendants are accused.

The statute is aimed at every scheme and artifice which [761] is in fact designed to defraud, provided in involves some element of trickery or deceit. No matter how seemingly fair and honest a scheme may appear, it is within the statute if the intent and purpose is to deceive and defraud the unwary. That a scheme would not deceive one of ordinary intelligence or that those intended to be deceived were particularly gullible, does not relieve the promoter thereof from responsibility, the statute being intended for the protection of the ignorant, unwary, and credulous as well as others. The statutory scheme may be found in any plan to get the money or property of others by deceiving them as to the substantial identity of what they are to receive in exchange.

A statement or representation may be false and untrue in fact without being fraudulent, as where it is made in good faith or through honest mistake.

To be false and fraudulent within the meaning of the statute, it must be put forth with intent to deceive, and either with knowledge of its falsity or with such reckless disregard to its truth as may be regarded as equivalent to knowledge. Fraud and deception, within the meaning of this statute, may be by means of implications reasonably derived from representations as well as by express words, and may result from the use of statements not technically false, or, even, under certain circumstances, literally true, where there is present the intent to deceive.

The statute requires that the intent and scheme to defraud shall exist at the time the mails are used. Generally speaking, then, we may say that to devise a scheme or artifice to defraud is to form a plan, device or trick to perpetrate a fraud upon another or others, and the devising of it continues as long as the scheme is in process of execution. It is not necessary that the accused be the inventor or orig- [762] inator of the scheme or artifice or that, when the artifice was devised, the schemer should have worked out all the details of its execution. The crime is complete when the scheme to defraud is devised and the mails are used in an attempt to execute it, and in that connection I am referring only to the mail fraud counts. All I have said and all the other general instructions which I have heretofore given you are applicable to the conspiracy count as well as to the mail fraud counts, but the conspiracy count, as I have already said, will be the subject of further particular instructions before I have completed.

The statute defines three ways in which the use of

the mails in execution or attempted execution of any fraudulent scheme to obtain money or property violates the statute: (a) By placing or causing to be placed a letter or other communication in a post office, to be sent and delivered by the Post Office Establishment of the United States; (b) by taking or receiving any such therefrom; and (c) by causing a letter or other communication to be delivered by mail according to the direction thereon, etc. So far as these mail fraud counts are concerned, the use that is made of the mails may be unpremeditated and purely incidental; the communication may be between schemer and victim—I just call them that without prejudice—but it is not necessary that it shall be; it may be between the schemer and his agent or between the schemer and third parties. The communication used must be a step in the execution or attempted execution of the scheme devised; it is the purpose, inspiring the use of the mails, that brings the scheme-deviser under the law. If he thinks that the use which is made of the mails may assist in carrying the scheme into effect, the offense is committed, whether it actually is effective or not. [763]

It is not necessary to prove that an offense was committed upon the day alleged in the indictment. The general instruction which I have given you as to the burden upon the prosecution in connection with every material allegation of a particular count does not mean that, by the described scheme to defraud, alleged or referred to in the mail fraud counts, it was planned by a defendant that all of the false representations, pretenses and promises therein de-

scribed were to be employed, but you do have to be convinced by the evidence beyond a reasonable doubt, before you can lawfully return a verdict of guilty thereon, that such defendant devised or intended to devise a scheme to defraud by means of at least one of the false representations, pretenses or promises described or referred to in any such count.

To prove the existence of the scheme or artifice alleged in the indictment it is necessary for the plaintiff to prove beyond a reasonable doubt as that phrase has previously been defined to you that the defendants devised or intended to devise that scheme or artifice substantially as it is described in the indictment. Such proof is not made by proof of another or different scheme, or by proof of various separate and independent schemes to do some of the things alleged in the indictment to have been part of the scheme there described. In other words, proof that the defendants devised or intended to devise one or more unrelated and independent schemes, each one of which included only a part of the things alleged in the indictment, would not be proof that the defendants devised or intended to devise the scheme or artifice described in the indictment.

The indictment in this case contains certain allegations which now, at the conclusion of the trial, the Court believes should be withdrawn from your consideration for [764] reasons which it deems sufficient as a matter of law. Allegations which are immaterial to a determination of the issues may be considered to be surplusage and it may be for that reason that the Court is impelled to direct you to

disregard them or there may be no proper evidence introduced in support of such allegation.

You are instructed to disregard the following words taken from the first paragraph on Page 5 of the indictment, beginning in the fourth line of said paragraph and page, to wit: 'theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California.' This paragraph will then read, and you are to consider it as reading, as follows:

> 'That the defendants would and did represent to the persons intended to be defrauded that the First Security Deposit Corporation would and did loan or advance money only upon security or properties; whereas in truth and in fact, as the defendants, and each of them, then and there well knew, large sums of money and property belonging to the said corporation were loaned and diverted to the defendants and to Investment Finance Company for the use and benefit of the defendants without any security whatsoever.'

No proof was offered upon that particular clause of that paragraph and I regard it as surplusage.

No proof has been offered with regard to the following overt acts of count 15 of the indictment—these various overt acts beginning on page 34 of the indictment—and you are therefore to disregard the allegations of overt acts numbered: 15, 18, 19, 21, 22, 23, 26, 28, 31, 32, *35*, 34, [765] 36, and 40.

Now, gentlemen, you are not to be in any way biased or prejudiced against or in favor of the plain-

tiff because of those allegations in the indictment, nor are you to be biased or prejudiced either in favor or against the defendants, or any of them, because those charges were contained in the indictment. You just consider as though the clauses were never there.

Fraud alone, as operated against the public, is not punishable under a federal law. It may be interesting to the State officials but it is not interesting to the federal court. It is only when the mails are used in some way in connection with such fraud that it becomes punishable under our jurisdiction and under these mail fraud counts. The fact that anyone was defrauded by the Reed deal or any other deal which has been testified to here would be of no interest to the federal court at all, but would be, if anything, a state matter. Congress has declared that the mails must not be used in any wise to further fraud or deception for the purpose of obtaining from others their money or property. Where a scheme to defraud or for obtaining money or property on false representations and promises has once been established, each letter mailed in furtherance thereof becomes an offense, and an indictment could charge as many counts as there were letters mailed for such purpose.

Any false, deceptive or deluding pretense put forth through the mails to obtain other people's money is an offense under this law. Mere falsity of representations, is not, however, sufficient. A false representation does not amount to fraud unless it is made with fraudulent intent.

The first question for you to determine in connection with the mail fraud counts of this indictment is this: Was [766] there a scheme to defraud? If the evidence fails to satisfy your minds beyond a reasonable doubt that there was devised a scheme to defraud, then it will be unnecessary for you to consider further the evidence, for the reason that, without the existence of a scheme to defraud on the part of these defendants, or some of them, there could be no conviction under the indictment. The existence of a scheme to defraud is one of the essential elements of a charge under the mail fraud statute.

Before you can lawfully return a verdict of guilty upon any of the mail fraud counts, it is necessary that you be convinced from the evidence beyond a reasonable doubt, that the particular defendant, the question of whose guilt is being considered by you, used or caused to be used the post office establishment of the United States in the manner alleged in the particular count being considered.

You are instructed that it is the law that no matter how sound or how practical a scheme or business undertaking may be, and no matter how much faith those devising it have in the success of the undertaking, if it is the intention of those devising it or executing it to obtain money by false representations, false pretenses or false promises, it is such a scheme as the statute contemplates, and if in executing the scheme or undertaking, false representations, false pretenses or false promises were made by the defendants, or any of them, for the purpose of obtaining money with knowledge of the falsity there-

of, that would constitute a violation of the statute, provided the mails of the United States are used in furtherance of the consummation of said scheme as pointed out in these instructions.

Now, as I have stated, the gist of the offense under these mail fraud counts is the misuse of the United States mails. [767] It is not necessary, under the statute, that a fraudulent scheme or artifice, when formed, shall contemplate the use of the United States mails as a means of its execution, as the use of the mails in furtherance of a fraudulent scheme or artifice may be an afterthought not included in the original fraudulent scheme. The point is, were the mails actually used.

In a scheme to defraud where two or more participate, one man may form and accomplish it, with or without assistance; but all who with criminal intent join themselves even slightly to the principal schemer, are subject to the statute, although they may know nothing but their own share in the aggregate wrongdoing.

Generally, with respect to this question of fraudulent intent, it may be said that its existence or nonexistence is to be determined by you from all the facts and circumstances admitted in evidence, and your practical experience and daily observations of the intents and acts of men will materially aid you in determining this matter of intention. The intent with which an act is done may be clearly and conclusively shown by the act itself, or by a series of acts, or by the circumstances under which the acts were com-

mitted. In many cases, the actions of men speak their intentions more clearly and truthfully than words.

The intent or intention with which acts are committed is manifested by the circumstances connected with the transactions and the sound mind and discretion of the accused. The intent with which an act is committed being but a mental state of the party accused, direct proof of it is not required, nor, indeed, can it ordinarily be so shown; but it is generally derived from and established by all of the facts and circumstances attending the doing of the acts complained of as dis- [768] closed by the evidence. In order for you to determine this question of intent, you will look to all of the evidence in the case, oral and documentary, and to all of the facts and circumstances in connection therewith. It is, of course, true that a fraudulent intent is never presumed. On the contrary, the law presumes that all men are honest in their motives and their dealings, their relations with others; that they are always actuated by good faith and must not be adjudged in want thereof, or to be inspired by evil intent except upon proof of the same beyond a reasonable doubt. So, too, in this same connection, where a given transaction or series of transactions that may be called in question is reasonably susceptible of two different constructions, one that is fair and honest and in consonance with good faith, and the other dishonest and in keeping with the fraudulent intent, then the law says that the jury must adopt the construction in favor of honest, fair dealing and good faith and reject the other looking to the contrary direction.

In a scheme to defraud where two or more participate, one man may form and accomplish it, with or without assistance; but all who with criminal intent join themselves even slightly to the principal schemer, are subject to the statute, although they may know nothing but their own share in the aggregate wrongdoing.

In the foregoing instructions the Court has used the expression 'used or caused to be used the Post Office establishment of the United States.'

In explanation of the foregoing, it is not necessary to warrant a verdict of guilty upon one of the mail fraud counts, that a defendant be shown by his own hand to have placed in the post office the mail matter therein described, thereby causing it to be delivered by mail. [769]

The one who placed it in the post office may have been entirely innocent.

In determining whether such defendant caused the use of the mails of the United States as alleged in the indictment, you will take into account whatever the evidence has shown, if anything, such defendant had to do with the therein-described mail matter before its mailing; and, in determining whether such defendant caused the described use of the United States mail, you have a right to give weight to the presumption that every man is presumed to intend the natural and probable consequence of his voluntary act. This presumption is not a conclusive presumption but may be rebutted.

If you do not find from the evidence, beyond a reasonable doubt, that a defendant devised the

scheme or artifice to defraud described in a particular count or that to which reference is therein made, or joined in the scheme, his using or causing to be used the United States mails would not constitute an offense and you should acquit such defendant on such count.

The mere placing or causing to be placed in the United States mails of the described mail matter thereby causing its delivery by the United States mails as alleged in the mail fraud counts is not an offense unless it was done for the purpose of executing a scheme or artifice to defraud devised as therein alleged.

It is for you to determine whether or not any letter was mailed as alleged in the indictment or introduced in evidence herein. In that connection, you may take into consideration all the circumstances; that is, all the items of direct and circumstantial evidence—the fact that the letter was written on the stationery of a particular company headed at Los Angeles, that the company conducted its business [770] and had its main office or an office there, that the letter was written with respect to such business, was mailed in the regular course of business, the custom of that business as to mailing, that a letter was apparently received by the addressee through the mails, that responsible parties caused the letter to be mailed, etc. These are but illustrations of items of evidence which you may consider in determining whether or not the mails were used in connection with any particular letter. No one element may be conclusive. You may take all of them into consideration in deter-

mining whether or not the mails were used as alleged in the indictment.

Now having devised a scheme or artifice to defraud, if a defendant or defendants are found by you to have deposited or to have caused to be deposited the letters described in the indictment in the mails in this district, each defendant is responsible therefor, regardless of which defendant deposited or caused the depositing, provided such defendants were parties to the scheme to defraud as charged at the time any such letters were mailed. On the other hand, if any particular defendant or defendants became party or parties to the scheme only after the letters were mailed, such defendant or defendants cannot be found guilty. That is, defendants must be shown to have become parties to the alleged scheme prior to the mailing of each separate letter alleged. Thus, if in your judgment you so conclude, some defendant or defendants may be found guilty under one or more counts of the indictment, and not quilty as to other counts.

You should not find a defendant guilty unless you are convinced, beyond a reasonable doubt, that one or more of the false representations or promises described in the indictment were a part of a scheme of his to defraud, even thought [771] you are convinced by the evidence beyond a reasonable doubt that in furtherance of a scheme to defraud such defendant made false representations and promises not described in the indictment, but you may consider other false representations and promises of a defendant, if any have been shown, of a similar

character, in determining his intent in making any of those described in the indictment which it has been shown by evidence, beyond a reasonable doubt, he made.

You are instructed as to each of the count letters that as to those defendants whose names do not appear upon the letters charged in the indictment, in order to find that they had implied knowledge of the writing or mailing of the said letter, you must first be satisfied beyond a reasonable doubt that they were parties in knowledge to the fraudulent scheme or artifice.

You are instructed that before you can find guilty any defendant who did not use the mails by forwarding a letter within the manner charged in the indictment, you must find, beyond a reasonable doubt, that he had actually joined with the defendant so using the said mails in the alleged scheme for the purpose of defrauding in the manner alleged in the indictment as you have been fully advised in other instructions given.

Exhibit No. 144 is a letter allegedly received by the witness Wright. This letter has been handed to you for inspection. You must decide whether or not it was mailed, and in making such inspection of the letter as you desire to make, you are instructed that you are at liberty to weigh the probability or improbability from such physical inspection of the document whether the same was or was not ever placed in an envelope, and was or was not transmitted through the United States mails. [772]

If any one of the letters described in the mail

fraud counts of the indictments was not mailed or caused to be mailed by the defendants in execution or attempted execution of the scheme or artifice alleged in the indictment, but in execution of some other scheme or artifice—even though such other scheme or artifice was one to do some of the things alleged in the indictment to have been part of the scheme there alleged—you must acquit the defendants on the particular count in which such letter is set out.

You will recall that the indictment charges certain letters to have been sent through the mails and that they were deposited in the United States mails by the defendants in execution of the scheme to defraud. The letters standing alone may not be sufficient to show a fraudulent intent, but you may consider them in connection with all other evidence in the case in order to determine with what intent they were so used. In addition to the letters set forth in the indictment, other writings and evidence have been introduced here for the purpose of aiding you in determining the intent of the defendants. You have a right to consider these writings, together with other evidence in the case, in determining this question of intent.

And where, as here, a specific criminal intent is a part of an offense, in order that a principal may be convicted by reason of the acts of his agents, it must be shown that the principal knowingly and intentionally commanded, aided, advised, or encouraged the criminal act committed by the agent, or assented to it.

Good faith, as I have said, is a complete defense to a prosecution for use of the mails to defraud. That is, if the persons or any of them charged with the offense did the acts charged honestly and in good faith, in the justi- [773] fiable belief that they were or he was acting honestly and in the pursuit of a legitimate business, and without intent to defraud, then there is no such scheme or artifice to defraud as is necessary to be proved in cases of this sort. Therefore, if you believe from the evidence that any defendant did whatever he may have done in good faith, without knowledge of any scheme or artifice to defraud, and without any intention of defrauding anyone, or even if you have a reasonable doubt as to whether such was not the case, you must find such defendant innocent of the charges against him.

The intent of a defendant charged under the provisions of the law stated is a material element necessary to prove the offense, and in arriving at a decision upon that question all the facts and circumstances shown in the case as touching the conduct of the defendants should be considered. If a defendant makes a representation to another as to things which do not exist and it appears that he had no reasonable ground to believe that the fact was as he stated it, such statements and conduct are to be taken into consideration in determining whether an innocent misstatement was made in good faith; or whether the intent was that others were to be deceived; that the defendant should reap a benefit and the other suffer a loss. Criminal in-

tent may be implied from the acts and conduct of a defendant. His acts and his conduct, as shown by the evidence, considered in their relation to the charge made, may establish satisfactorily a criminal intent. If the statements alleged to have been falsely and fraudulently made by a defendant were made in good faith, and at that time the defendant believed or had reason to believe they were true, they would not be evidence of a fraud. [774]

The indictment alleges that the scheme was to obtain money or property by false pretenses, representations and promises.

A false representation relates to something past or existing at the time the representation is made and then known to be false and made with the intent and purpose to induce another to act to his prejudice in the belief that it is true.

A false promise differs from a false representation in that it relates to something promised to be done in the future.

If such statements were entirely false and known by a defendant to be false, and he well knew that he had no reason to believe them to be true, they would, within the meaning of this law, be false promises.

The foregoing instruction relating to the difference between a false representation and a false promise is based upon the allegations of the indictment and you are not to infer from the giving of such instruction that the Court means to imply aught as to the evidence in the case, because you are, as I have said, the sole judges of it. I simply

want to point out to you the distinction between the two.

There are certain elements necessary whether it be a false representation or false promise that is being considered, the absence of any one of which results in there being, in law, no false representation or no false promise.

First, one must state something to be true.

Second, the thing stated must, in fact, be false.

Third, at the time of stating it a defendant must know it to be false.

Fourth, a defendant must state it as true with the intent on his part that another should act, to his prejudice, [775] relying upon the truth of the false statement.

A defendant is not guilty if you find that his plan or scheme was merely improvident or impracticable and no more. Defendants are not on trial for mere errors of judgment or negligence in their conduct of business.

A defendant's good or bad faith in these matters is to be determined and his several acts and declarations construed and interpreted, by conditions as they existed at the time the acts were done and declarations made, and as they appeared to such defendant at that time, and not as subsequently shown in fact to be.

The mere fact that a representation made by a defendant was untrue, would not be sufficient to constitute fraud on his part, unless at the time of making such statement such defendant knew it to be false or knew he had no reason to believe it to

be true. This knowledge must be actual knowledge upon his part. There is no fraud in a misrepresentation which the maker believes to be true, even though he has been negligent or too credulous or visionary, but the mere fact that there had been represented to a defendant that which he in turn represented, as alleged, would be no defense if such defendant knew it to be false at the time of his making such representation.

An honest expression of opinion actually entertained or such an honest representation in regard to a matter of estimate or judgment, though it proved to be erroneous, is not such a false or fraudulent misrepresentation as the defendants are charged with making in this case.

If one, after learning of the falsity of a representation, continues to make it, he cannot escape responsibility because he originally believed it to be true.

While there may be liability for damages in a civil [776] suit on account of things promised which did not come to pass, one would not be guilty of a crime unless he knew that a promise made was false when made.

No matter how unwarranted by the facts or extravagant a promise may be, if the party making it honestly believes that it will be carried out, there is no guilt.

The extravagance of a promise or the puffing or the honest belief that something is going to happen doesn't mean fraud. That is true as to future or contingent promises or statements as to future or

contingent events or as speculations or probability.

You are instructed that with respect to any alleged representation embodying or amounting to an expression or statement of opinion, such representation cannot be found to have been false merely because such expression or statement of opinion now turns out to have been erroneous or different from the opinion of some other person or persons. If such opinions were expressed honestly and in good, faith and with reasonable grounds for the belief upon which they were based, then they cannot be held or found to have been fraudulent.

You are instructed that business dealings between two or more corporations are not made fraudulent or wrong by the mere fact that some individual may be an officer or director in two or more corporations. Therefore, in this case you are not at liberty to infer that there was devised a scheme and artifice to defraud, simply from the fact that in one or more of the transactions there may have been an overlapping directorate. That is a fact that you may take into consideration together with the other facts as bearing on the question of whether there was a fraudulent intent.

There is no presumption that a scheme or artifice to [777] defraud, even if shown to have existed at one time, continued to exist at any later or subsequent time. Therefore, the plaintiff's burden of proving that the scheme or artifice alleged in the indictment was in existence at the time of the alleged mailing of each of the letters described in the indictment, is not sustained by evidence that

such alleged scheme or artifice existed or might have existed at some time prior to the alleged mailing of any particular letter.

The fact that letters other than those specifically alleged in the indictment may have been mailed or caused to be mailed by the defendants, or some of them, is entirely immaterial in determining, as I have said, other than the intent.

As I have instructed you, the first 14 counts of the indictment, eliminating Counts 3 and 10, are what we call the substantive counts, and in each of these counts the defendants are charged jointly with having devised and intended to devise a scheme and artifice to defraud and for obtaining money and property from certain persons mentioned in the indictment and other persons whose names are to the grand jurors unknown and from investors in the Railway Mutual Building and Loan Association who had theretofore converted and transferred their investments in that association into securities of the First Security Deposit Corporation; all of which persons and class of persons are referred in the indictment as persons intended to be defrauded, by means of false and fraudulent pretenses, representations and promises. You are instructed that, while it is competent for you, in considering the evidence, to render a verdict of guilty against only one defendant, if you find beyond a reasonable doubt that he alone indulged in a [778] fraudulent scheme within the terms of this indictment, as the same has been interpreted to you in these instructions, at the beginning or after the

enterprise started, and caused the mails to be used in any instance as charged in furtherance of that scheme, however, the last, or 15th count, charges all of the defendants named in the indictment as partners in crime, charging that they had devised and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises from those persons described and named in the first count of the indictment as the persons intended to be defrauded, and, for the purpose of executing such scheme and artifice, to place and cause to be placed in the post office establishment of the United States letters, etc., and other mail matter, as alleged. Now, a conspiracy, such as here alleged, is not an omnibus under which the prosecution can prove anything and everything. The charge or accusation is limited by the terms of the indictment. The indictment charges but one conspiracy, and no defendant can be convicted thereunder unless it can be shown beyond a reasonable doubt that he consciously became a member of that particular conspiracy. Further, the scope of the conspiracy must be gathered from the testimony, and not from the averments of the indictment. The latter may limit the scope of the evidence, but cannot extend it. As to the defendant Twombly, the indictment is, as I have heretofore explained to you, also limited by the bill of particulars.

I have also heretofore explained to you, in connection with the mail fraud, or substantive, counts

of the indictment, that there are two elements to the mail fraud offense within the criminal code: First, the devising of some [779] scheme or artifice of a kind described, and, second, the use of the mails in execution, or attempted execution, thereof, as indicated in the statute. As I have said, under these mail fraud counts, the crime is complete when the scheme to defraud is devised and mails are used in an attempt to execute it. These mail fraud counts require a specific intent to defraud; they do not require any intent to use the mails in that connection. The crime becomes complete after the mails are actually used, whether the parties intended to so use them or not.

Now, under this 15th, or conspiracy count, there must not only be the intent to defraud, but there must be also the intent to use the mails in the execution, or the attempted execution of the fraudulent scheme. You must then remember that in the conspiracy count there must be both an intent to defraud and an intent to use the mails in the carrying out, or in the attempted carrying out, of the fraudulent scheme; also, there must be two defendants conspiring. A man cannot conspire with himself.

A conspiracy, within the terms of the criminal code, is a combination of two or more persons by concerted action to accomplish a criminal and unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. It is a partnership in criminal purposes. The gist of the crime is the confederation or the combination of the minds.

A conspiracy to commit the offense of using the mails in execution of a scheme to defraud involves not only a conspiracy to devise a fraudulent scheme, but a conspiracy to use the mails in its execution. Parties to such a conspiracy, who did not intend that the mails should be used, are not subject to conviction under this 15th count, [780] because conspiracy is, essentially, a crime of intent. It is not, however, necessary that there be an actual mailing of a letter in order that there may be guilt of a conspiracy, if the intent to so use the mails is present.

Under this conspiracy count there are really three elements of the offense: (1) The devising of some scheme or artifice of the kind described in the statute: (2) A use of the mails in execution, or attempted execution, thereof, in one of the three ways specified in that statute; and (3) An intent to use the mails in execution, or attempted execution, of the fraudulent scheme.

Title 18 USC, Sec. 88, provides:

> 'If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished' as provided in the act.'

A conspiracy is constituted by an agreement; it is, however, the result of the agreement and not the agreement itself. No formal agreement between

the parties is essential to the foundation of the conspiracy. People very seldom sit down and say, 'Let us conspire right here and now to do certain things and put it down in writing.' Human beings don't do that. The agreement may be shown if there be concert of action, all parties working together understandingly, with a single purpose for the accomplishment of a common purpose.

The purpose to be accomplished by the conspiracy may be either lawful or unlawful. If the purpose is lawful [781] and is carried out by lawful means, then no offense is committed under the statute. If the purpose is lawful and is carried out by criminal or unlawful means, then the statute is violated. On the other hand, if the purpose is unlawful and is carried out either by lawful or unlawful means, the statute is violated. The only time the statute is not violated in those illustrations is where the purpose is lawful and is carried out by lawful means. Then no crime has been committed. The purpose of the conspiracy may be continuous. That is, it may contemplate a commission of several offenses or overt acts. The agreement forming the basis of the conspiracy may be a continuing one, and the conspiracy itself may be a continuing one, contemplating a whole series of unlawful acts, or unlawful course of conduct extending over a considerable period of time.

The crime is completed when any one overt act, to effect the object of the conspiracy, is done by at least one of the conspirators. An overt act is something apart from the conspiracy itself, and is an act

to effect the object of the conspiracy. It need be neither a criminal act, nor the very crime that is the object of the conspiracy. That is, the overt act does not have to be a criminal or an unlawful act. It must, however, accompany or follow the agreement, and must be done in furtherance of the object of it.

All of the conspirators need not join in the commission of an overt act, for, if one of the conspirators commits an overt act, it becomes the act of all the conspirators.

The conspiracy alone does not constitute the offense, as I have heretofore indicated. It needs the addition of [782] the overt act; such act is something more, therefore, than evidence of a conspiracy. It constitutes the execution or part execution of the conspiracy and all incur guilt by it, or further complete their guilt by it, consummating a crime cognizable by our courts.

The indictment in this case charges that certain overt acts were committed by some one or other of these defendants and of the alleged joint conspirators in furtherance of, in execution of or to effect the object of such willful and unlawful conspiracy.

It is not necessary that all of the alleged overt acts be proved. It will be sufficient to complete the offense if the proof establishes one of the alleged overt acts performed by any one of the conspirators while the conspiracy was in progress and after each of the alleged conspirators became a party to the unlawful agreement. Mere commission of any or all of the overt acts charged in the indictment

will not be enough to warrant a verdict of guilty against any or all of the defendants on this Count 15 unless you find that there was an unlawful agreement, and that one or more of those acts were done by one or more of the conspirators, in furtherance of the conspiracy, and during its continuance.

To constitute a conspiracy it is not necessary that two or more persons should meet together and enter into an express or formal agreement for the unlawful venture or scheme, or that they should directly, by words or in writing, state between themselves or otherwise what the unlawful crime or scheme is to be, or the details thereof, or the means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly [783] come to a mutual understanding to accomplish a common and unlawful design. In other words, when an unlawful end is sought to be effected, and two or more persons actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy. The success or failure of the conspiracy is immaterial, but before the defendants may be found guilty of the charge it must appear beyond a reasonable doubt that a conspiracy was formed as alleged in the indictment, and that the defendants were active parties thereto.

Each party must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one perform-

ing one act, and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Cooperaion in some form must be shown. There must be intentional participation in the transaction with a view and purpose to further the common design. The acts or declarations of a party shown by the evidence to be a member of a scheme to defraud by use of the United States mails, a conspiracy so to do, if any there was, done or said prior to the formation of any scheme or conspiracy, are not to be considered by you against any other defendant. And if a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a purpose to forward the enterprise or scheme, assist in its prosecution, he becomes a conspirator. And so a new party, coming into a conspiracy after its inception, with knowlege of its purpose and object, and with intent to promote the same, becomes a party to all of the acts done before his introduction into [784] the unlawful combination, as well as to the acts done afterwards. Joint assent and joint participation in the conspiracy may be found, like any other fact, as an inference from facts proved.

The evidence, as I have said, in proof of a conspiracy may be circumstantial. Where circumstantial evidence is relied upon to establish the conspiracy or any other essential fact, it is not only necessary that all the circumstances concur to show

the existence of the conspiracy or fact sought to be proved, as I have heretofore indicated, but such circumstantial evidence must be inconsistent with any other rational conclusion.

Where the existence of a criminal conspiracy has been shown, every act or declaration of each member of such conspiracy, done or made thereafter pursuant to the concerted plan and in furtherance of the common object, is considered the act and declaration of all of the conspirators and is evidence against each of them. On the other hand, after a conspiracy has come to an end, either by the accomplishment of the common design, or by the parties abandoning the same, evidence of acts or declarations thereafter made by any of the conspirators can be considered only as against the person doing such acts or making such statements. The declaration or act of a conspirator not in execution of the common design is not evidence against any of the parties other than the one making such declaration.

It is not necessary that it be shown that any person concerned in the alleged conspiracy profited by the things which he did, but if a defendant, with knowledge that the law was designed to be violated in the particular manner charged in the indictment, aided in any manner by affirmative action in the accomplishment of the unlawful act, [785] he would be guilty. To this statement there is one exception, and that is, if before any overt act has been committed on the part of any conspirator or at his suggestion or with his aid or participation, and such conspirator withdraws from the conspiracy and

wholly disassociates himself from the project or the carrying out thereof, he ceases to be a conspirator and is without guilt.

You are instructed that the existence of the conspiracy charged cannot be established against an alleged conspirator by evidence of the acts or declarations of his alleged co-conspirators done or made in his absence. Mere knowledge or approval of or acquiescence in the object and purpose of a conspiracy without agreement to cooperate to accomplish such object or purpose is not enough to constitute one a party to the conspiracy.

When, as here, one large conspiracy is specifically charged, proof of different and disconnected smaller ones will not sustain conviction; nor will conviction be sustained by proof of a crime committed by one or more of the defendants, which is wholly apart from and without relation to others conspiring to do the thing forbidden.

While mere knowledge that others are violating the law does not make one a principal in the commission of such an offense, even though, having such knowledge, one does nothing to defeat the criminal purpose of those engaged in the commission of the crime, yet, where men have agreed, acting upon a common purpose, to commit a crime, during the continuance of such conspiracy the conspirators have made one another agents to act in furtherance of the conspiracy. Each conspirator, by such criminal agreement, has started evil forces and he cannot free himself from liability criminally for the

consequences—including acts of other [786] conspirators to effect the object of the conspiracy—merely by turning his attention to something else. To avoid criminal liability, one once having conspired with others to commit a crime must withdraw his support from the criminal forces which he has started. This requires affirmative action upon his part—the doing of some act to disavow or defeat the conspiracy into which he has entered.

No statement, declaration or conversation of any defendant can be considered by you, as against any other defendant for the purpose of determining whether or not a conspiracy existed as charged; and if, disregarding and giving no effect to any such statement, declaration or conversation of the other defendants, you have a reasonable doubt as to whether or not the remaining evidence proves the existence of such conspiracy, then you must acquit those defendants.

You are instructed that the evidence shows that when the loan to the Pierce Petroleum Company was made by the Investment Finance Company in 1935 that it shows that that was made at that time and there is no evidence in the record that any of the defendants were directors of Pierce Petroleum Company at that time, and you may so find.

Unless you find that there was a concert of action between the various defendants under the substantive, counts, or a conspiracy under the 15th count, the evidence is received only as to the particular defendant whom it concerned.

If you are satisfied, from all of the evidence, that the sellers of the bonds and stock or stock or bonds in question were told that they would receive a certain price in money for their securities and if they decided to take this price and to receive the same in cash and they were [787] paid in cash and received exactly what they bargained for then there can be no offense and the defendants, and each of them, are entitled to a verdict of not guilty, provided there was no fraud or misrepresentation in connection with the transaction.

It is alleged in the indictment that the defendants at all times represented and pretended that said First Security Deposit Corporation was organized for the purpose of and was duly and actively engaged in the liquidation of assets received by it from the Railway Mutual Building and Loan Association, whereas, in truth and fact, the defendants, and each of them, knew that no such liquidation was being carried into effect. You are instructed that the question as to whether such liquidation was being carried into effect is a question of fact for your decision. You are to understand, of course, that the word 'liquidation' does not mean sale for cash. The liquidation might require several steps before a complete reduction to cash was possible and might conceivably involve several exchange transactions.

Now, it is a fact, and you must so find, that the defendant Twombly had no connection of any kind with the organizing or forming of the First Security Mortgage Corporation, the First Security Deposit

Corporation, R. F. D. Discount Company, Inc., or Consolidated Investors, a corporation. He was not an officer or agent of the First Security Mortgage Corporation, R. F. D. Discount Company, Inc., or Consolidated Investors, a corporation. The plaintiff does not contend that the defendant Twombly exercised control, as I have shown you, over either the First Security Mortgage Corporation, R. F. D. Discount Company or the Consolidated Investors. [788]

You are instructed that the testimony of the witness Perkins and the witness Forrest Betts was not admitted as against the defendant Twombly, and you are not to consider it in that connection.

With reference to the allegation in the indictment, 'That on or about the 15th day of March, 1939, at Los Angeles, California, defendants Russell W. Starr, Alfred R. Ireland, Edward C. Thomas, Joseph L. Smale and J. Howard Edgerton attended a meeting of the Board of Directors of the Investment Finance Company,' that that transaction took place after the date on which the plaintiff admits that the defendant Twombly is not chargeable. He on that date withdrew, if he was ever, as a member of the conspiracy within the terms that I have been giving you. He severed his connection with all of the corporations on the 21st day of December, 1938, and the plaintiff doesn't claim that he is chargeable with any criminal action which happened subsequent to that date.

Now as to the Defendant Cronk, the theory of the indictment and of the prosecution is that the de-

fendant Cronk, although not one of the original joint schemers, or the original conspirators, or connected with the consummation generally, either knowingly joined the general conspiracy or combination, or both, and participated in the execution of their purposes. Now this theory doesn't require that each member of the combination or each of the conspirators shall participate in or have knowledge of all its operations. A defendant may join at any time in the progress of the combination or the conspiracy and be held responsible for all that has been done, or may be done, until he terminates his connection. It is not necessary to this defendant's guilt, as we have said, that he be one of those who originated the scheme or device to defraud or that he was one of the original conspirators. [789] That is, he need not have been one of the first who schemed or conspired as alleged, but it is necessary to guilt that he be shown by the evidence, beyond a reasonable doubt, to have become one of the schemers as to the mail fraud counts, and that thereafter the mails were used in carrying out the scheme, or one of the conspirators during the continuance of the conspiracy, as to the 15th count of the indictment, and that thereafter one or more of the overt acts alleged were done as alleged. Unless you find that to be the fact, you must find the Defendant Cronk innocent of the charges.

The fact that you find that a combination to effect a scheme or artifice to defraud, or a conspiracy to defraud, was formulated prior to the Defendant Cronk's connection therewith—if you do find such

a connection or joining by Cronk, or such conspiracy—that does not in any way tend to charge the Defendant Cronk with a knowledge thereof, unless you also find that the existence of said scheme or artifice to defraud and said conspiracy or the combination and the objects of it were communicated to him or that he was apprised and had knowledge of the existence of either or both, if you find he joined both.

With reference to the testimony of the witness Walker, this witness testified that he made a proposition for the sale of his bonds to Mr. Cronk, and you will consider such testimony as to whether or not he made this proposal to Mr. Cronk freely and of his own volition, rather than by reason of any statements, written or oral, made by him to Mr. Cronk, and if you so find then you will disregard the testimony of said witness.

Now Cronk was a temporary employee of the Investment Finance Company on a month to month basis, commencing on the 7th day of July, 1937, and ending on the 31st day of October, [790] 1938, and therefore he is not chargeable with any criminal action set forth in the indictment after that date, and you will so find. He was not at any time a stockholder, depositor, security holder, officer, manager, or employee of the Railway Mutual Building and Loan Association, Bond 17 Dog Food Company, American National Bank of Santa Monica, or Pierce Petroleum.

Now with reference to the charge in the indictment which I have read to you a short time ago,

as to the meeting of the Board of Directors on the 15th of March, 1939 of Investment Finance Company, that took place after the Defendant Cronk left or had any connection.

As I have said, in connection with all actions and declarations of any of the other defendants happening or done subsequent to October 31, 1938, the Defendant Cronk is not chargeable therewith.

In determining the intent with which Mr. Cronk acted, you may take into consideration the fact that he was a month-to-month employee, working on a salary, he had no stock interest in the Investment Finance Company or any of the other companies referred to in the indictment or in the evidence, and had no way of making any profit through the sale of those stocks, only for the purpose, of course, in determining what his intent may have been, because it is not necessary for a man to make a profit on the deals.

Now I want to talk to you a little bit about this Exhibit 216 which, as you will recall, is the alleged statement of the Defendant Twombly. You were admonished upon the introduction of this evidence that the same was introduced as against the Defendant Twombly only, and likewise restricted as to the said Defendant Twombly as bearing only upon the element of intent. Now in connection with that instrument, [791] and also in connection with this audit report and Exhibit 155, and any other exhibits which have been restricted to the subject of intent, you must be very careful not to consider

those as evidence in any way of the facts which are indicated or of the acts or declarations which are indicated in those instruments. They are not evidence. They are only admitted for the purpose of showing what was the mental state, what was going on in the minds of the parties who were involved.

As to this Exhibit 216, it was as to the intent of the Defendant Twombly, as was also Exhibit 155, you are entitled to consider that document in relation to the intent, if any, that Twombly may have had with reference to his participation in the alleged scheme and artifice to defraud prior to December 21, 1938, when he severed his connection.

In arriving at this fact, you are instructed that the plaintiff has offered proof that the statement was written by the Defendant Twombly after his separation from his co-defendants and the companies mentioned in the evidence; that he was interrogated with reference to the said statement on July 9, 1940, a period of about one year, six months and 20 days after the admitted date of his separation from said defendants and said companies. There is no evidence before you as to when, after the Defendant Twombly separated from said companies, he wrote said statement, except as I have just stated.

The record also shows that some time about July of 1939 that that instrument came into the possession of the witness Webster, one of the postal inspectors.

You are not to consider the statement as determining the truth or falsity of matters therein related. There is further evidence that the Defend-

ant Twombly stated that he made the statement based upon matters that had come to his [792] knowledge during his association with the companies, and you are instructed that as a matter of law it is to be presumed that the statement was made upon the last day that he was connected with said companies, to-wit, December 21, 1938, and that the knowledge of the matters therein stated, if in truth and fact such knowledge was ascertained by Defendant Twombly prior to his disassociation, was ascertained at or about December 21, 1938.

You are instructed that it is the province of the jury to determine whether or not the Defendant Twombly believed that the said statements were true or false when made, and also it is your duty from the evidence to decide whether or not the information thus received, if it was in truth and fact received prior to his disassociating himself from said defendants and said companies, and thus construed by the said Defendant Twombly, may or may not have been the cause of his disassociating himself on said December 21, 1938, with said defendants and with said companies.

Should you find that a conspiracy to effect a scheme or artifice to defraud was formulated at any time prior to the first day of November, 1934, such finding, in and of itself, does not in any wise tend to charge the Defendant Twombly, or any other defendant, with a knowledge thereof, unless you also are able to find that the existence of said scheme and artifice to defraud was communicated to said de-

fendant and he was apprised and had knowledge of its existence.

If you find from the evidence that a situation was caused whereby the persons alleged in the indictment as those persons intended to be defrauded were not able to get as high a price for their securities in the sale of them as they would have had it not been for the activities of the defendants, other than the Defendant Twombly, then you are at liberty to find [793] that the defendants depressed and caused to be depressed the market price of the securities of the First Security Deposit Corporation as alleged in the indictment. As to the Defendant Twombly, the plaintiff has limited, by its bill of particulars, the activity of that particular defendant on this particular matter only as to the bonds of the company.

The defendants, or their counsel, have elected to submit this case for your decision without producing any witnesses in their own behalf. This is a right which they clearly enjoy under the law, and the jury are instructed not to draw any inference of guilt from the fact that the defendants have not themselves taken the witness stand, or produced any other witnesses in their own defense.

Now as to all of the 15 counts of this indictment, with the exception of the two which have been dismissed, which we do not consider, each defendant on trial has entered a plea of not guilty.

An entry by an accused person of a plea of not guilty places upon the prosecution the burden of showing, by evidence beyond a reasonable doubt,

the truth of every material allegation of the accusation upon which the accused is being tried. No burden rests upon a defendant to prove his innocence.

Upon each count of the indictment you will separately consider the question of whether the guilt of the particular defendant being considered by you has, by evidence, been shown beyond a reasonable doubt, and if you have a reasonable doubt concerning any material allegation of the particular count being considered by you as touching the particular defendant being considered by you, you will give him the benefit of such doubt and acquit. If you have no such reasonable doubt, your verdict must be guilty. [794]

If, after you have retired, there arises a disagreement among you as to any part of these instructions or the testimony, or if you desire to be informed or reinstructed on any point of law arising in the case, you must ask the Bailiff to bring you back into court, whereupon the information will then be given you.

It has been stipulated that you may take with you a copy of the indictment, a copy of the bill of particulars, and all of the exhibits except the books of account. The books of account will be left here because they contain many items which were not introduced in evidence. If you desire to be informed or to refresh your memory as to any item or items in the books of account, please communicate with the Bailiff and you will be brought back into court for that purpose. Certain documentary

evidence was introduced which is contained within a book covering other matters. I have directed the Clerk to seal off that portion not admitted in evidence and you are instructed not to examine it or consider it in any way.

Now, gentlemen, do you want a copy of the bill of particulars as furnished by the plaintiff to go also to the jury, or would you prefer not?

Mr. Adams: I would like to have it, your Honor. Your Honor read several pertinent parts of it, and did not read others which we consider very pertinent, and we would prefer, for that reason to have it go to them.

The Court: May it be so stipulated, gentlemen?

Mr. Campbell: It is all right with the plaintiff.

The Court: Is it satisfactory to all the defendants?

(Assent.)

Mr. Adams: May I call your Honor's attention to one word, which I think your Honor said— [795]

The Court (Interrupting): You are a little out of order at the present time. I will call you at the time.

Mr. Adams: I beg your pardon.

The Court: You are instructed that should you be unable to agree upon a verdict as to any one or as to all of the defendants, you are still entitled as jurors to bring in a separate verdict as to any defendant or defendants.

Now, gentlemen, you 11 men constitute the jury in this case under the stipulation of the court with

like effect as though you were 12. You must unanimously agree under our practice.

On retiring you should first elect a foreman. You will be handed certain forms of verdict as to each defendant. When you have decided upon a verdict, your foreman should fill out the appropriate form in accordance with the verdict, or the various forms in accordance with the verdict, and should date it and sign it.

I shall now ask counsel for the plaintiff if there are any objections to the instructions.

Mr. Campbell: No objections, your Honor."

[796]

"The Court: Now do counsel for the defendants wish to make any objections before the jury or would they prefer to have the jury retire for the purpose of making their objections?

Mr. Irwin: Your Honor, I understand we must make them in the presence of the jury. I would be very happy to do it either way. What is your Honor's understanding?

The Court: I think that if you are willing to do it in front of the jury, it is sometimes very helpful to them.

Mr. Irwin: There is only one, your Honor, that I think—I want to direct your Honor's attention to Defendants Starr, Smale and Thomas proposed Instruction 59. I except to that instruction for not being given.

The Court: Let me see it.

Mr. Irwin: May I hand it to you? I have it right here.

The Court: I don't seem to remember that instruction at all by number.

(The document referred to was passed to the court.)

The Court: I have already given this, the identical wording.

Mr. Irwin: The last portion I don't think was.

The Court: I will go over it again because it is correct.

When you retire to the jury room you should freely discuss and consult with each other as to the verdict which you are to render; but each juror is entitled to his own individual opinion on the facts and the weight and effect of the evidence. No juror [797] should surrender such opinion simply because of the opinion of the other jurors; and if any juror has a reasonable doubt as to the guilt of any defendant, his opinion in that regard should not be surrendered, so long as the doubt remains.

Mr. Irwin: Thank you, your Honor.

Now, may it please the court, in view of your Honor's assistance given before, may I just except by numbers to certain ones?

The Court: Are they all in here?

Mr. Irwin: Here is the rest of them.

The Court: Let me glance at each number as you give it.

Mr. Lawson: Our numbers are the same, your Honor.

The Court: I think so; yes. If you will just give me the numbers, I will look at them and follow along.

Mr. Irwin: Yes, your Honor.

87 to 91, inclusive.

The Court: 90 was one of yours.

Mr. Irwin: As I have my notes here, it is all those from 87 to 91.

The Court: The exception will be allowed as to 87, 88 and 89.

90 I will read to the jury:

You are instructed that the First Security Deposit Corporation, as the evidence shows, was organized in part for the purpose of, and was duly and actively engaged in the liquidation of the assets received by it from the Railway Mutual Building and Loan Association, and in turn deposited with the Metropolitan Trust Company, as trustee, as security for the collateral [798] trust bonds, pursuant to and in conformity with the trust indenture, Exhibit 51, creating said trust.

Mr. Irwin: Then, your Honor, on this one I don't know if this is a proper one for an exception, or whether it should be reached another way. If I may state it, it is with reference to the lines that your Honor struck out on Page 5.

The Court: Yes, this is the time to do it, and make an objection to that, and take an exception.

Mr. Irwin: Yes, your Honor. I am quite in accord with your Honor on the evidence, but

the objection is made that the instruction should be that the whole allegation since the evidence doesn't show any proof, should be deleted, and that it should not be left amended.

That is my objection.

The Court: The objection will be overruled, and an exception allowed.

Mr. Campbell: If the court please, in that connection, do I understand your Honor's instruction was that simply there was no proof on that portion of the allegation which was stricken, that is to say, to be approved by the Commissioner.

The Court: My view was that because of the peculiar formation of that paragraph, that those particular words alluding to approval by the Superintendent of Banks and the State Corporation Department could be deleted, and still the paragraph contain a charge proper in the indictment.

Mr. Campbell: Yes.

The Court: That therefore that was surplusage. If that couldn't have been, I would have stricken the whole paragraph. [799]

Now, the objection made by Mr. Irwin, that same objection may be deemed to have been made by all defendants and overruled, and an exception allowed, because it is a proper point, and it should be saved."

* * * * * * *

"The Court: Do you wish to join, on behalf

of your clients, in all of those objections and let exceptions be noted in the record also?

Mr. Lawson: Yes, your Honor.

The Court: That is allowed as to all defendants, wherever applicable."

* * * * * * *

Mr. Campbell: If the court please, I was going to say that there was one matter of confusion now existing; that is, as to the instruction given by your Honor with reference to the striking of certain words from the top of page 5.

As I understood your Honor's statement, or instruction to the jury, was that there was no proof of only that portion which stated 'to be approved by the Banking Commissioner or the Corporation Commissioner', or was it your Honor's instruction to the jury that there was no proof of the paragraph as it now remains after those words were stricken.

The Court: No, no. I said there was no proof of only the one element, that is, the approval by the Superintendent of Banks and the Corporation Commissioner.

The rest stands, and the proof stands.

The clerk will get together the exhibits in numerical order as fast as it physically can be done, and we will [800] hand them to the bailiffs, and they will come up and tap on your door, and in the meantime if you elect a Foreman the Foreman can then come to the door and he will hand them to you. And, remember,

if you want anything in these books of account, you may come back to the courtroom."

Said defendants requested instructions 87, 88, 89, 91 respectively, and are in words and figures following:

(Defendant J. Howard Edgerton's Requested Instruction No. 87.)

"You are instructed that the term 'market value', as the words thoroughly import, indicates price established in a market where the article is dealt in by such a multitude of persons and such a large number of transactions as to standardize the price. Proof of such market value can only be made by one of the recognized methods of proving the price current in a market. Individual dealings are not competent to prove it."

(Defendant J. Howard Edgerton's Requested Instruction No. 88.)

"You are instructed that the indictment in this case charges that the defendants did depress and cause to be depressed the market price of the securities of the First Security Deposit Corporation. You are further instructed that there is no evidence in this case proving the market price, or prices, of the securities of First Security Deposit Corporation, and as a consequence thereof, the government has failed to prove that the defendants, or either of them, did depress or cause to be depressed the market price of said securities." [801]

(Defendant J. Howard Edgerton's Requested Instruction No. 89.)

"You are instructed that there is no evidence proving that the defendants, or either of them, did convert, or divert to their own use, benefit, or profit large sums of money or property of the First Security Deposit Corporation, or of the persons described as those who were intended to be defrauded, under the pretense of loans, or by any other way or method, as charged in the indictment."

(Defendant J. Howard Edgerton's Requested Instruction No. 91.)

"You are instructed that the defendants, or either of them, did not represent to the persons described in the indictment as those intended to be defrauded, that the First Security Deposit Corporation would and did loan or advance money only upon security or properties theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California."

Thereafter, on, to-wit, the third day of April, 1942, the Jury in said cause retired to consider their verdict.

Thereafter, to-wit, on the 4th day of April, 1942, said Jury returned its verdict, finding the defendant, J. Howard Edgerton, guilty on counts 1, 2, 4, 5, 6, 7, 8, 9, 11, 12, 13 and 14.

Thereafter, on to-wit, the 13th day of April 1942, the said defendant, J. Howard Edgerton, filed his motion in arrest of judgment, which motion is in words and figures as follows:

"Comes now the defendant J. Howard Edgerton this 13th day of April, 1942, and moves the court to arrest judgment on each and every count in the indictment herein, upon which [802] the defendant was convicted, upon the following grounds and for the following reasons:

I.

That there has been no verdict against the defendant sufficient to sustain a judgment of conviction or a sentence thereon, inasmuch as the purported verdict returned by the jury is not a verdict based upon the indictment returned by the grand jury in this case.

II.

That on the 3rd day of April, 1942, this court lost jurisdiction to further proceed with this case in any respect, and did not have jurisdiction to receive the purported verdict of the jury herein, and has not, subsequent to April 3, 1942, had any jurisdiction whatsoever in this action, for the reason that on said date the court in an instruction to the jury changed the indictment returned in this case by the grand jury, and required this defendant to be tried by the trial jury upon an indictment altered and different from the one returned by the

grand jury, said instruction being given by the court on said date in the following language:

'The Court: The indictment in this case contains certain allegations which now, at the conclusion of the trial, the Court believes should be withdrawn from your consideration for reasons which it deems sufficient as a matter of law. Allegations which are immaterial to a determination of the issues may be considered to be surplusage and it may be for that reason that the Court is impelled to direct you to disregard them or there may be no proper evidence introduced in support of such allegation. [803]

'You are instructed to disregard the following words taken from the first paragraph on Page 5 of the indictment, beginning on the fourth line of said paragraph and page to wit: "theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California." This paragraph will then read, and you are to consider it as reading as follows:

'That the defendants would and did represent to the persons intended to be defrauded that the first Security Deposit Corporation would and did loan or advance money only upon security or properties; whereas in truth and in fact, as the defendants, and each of them, then and there well knew, large sums of money and property belonging to the said corporation were loaned and diverted to the defendants and

to Investment Finance Company for the use and benefit of the defendants without any security whatsoever.'

No proof was offered upon that particular clause of that paragraph and I regard it as surplusage."

III.

That the court erred in striking from the indictment the following language appearing on page 5 of said indictment:

'theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations',

for the reason that this defendant was entitled to be tried by the indictment as rendered by the grand jury in this case, and the action of the court hereinabove enumerated deprived this defendant of the rights guaranted to him by Article V of the Amendments [804] to the Constitution of the United States of America.

IV.

That the court erred in treating that portion of the indictment hereinabove quoted as surplusage.

That thereafter, on, to wit, April ....., 1942, the Court overruled said motion in arrest of judgment, to which ruling of the Court the defendant, J. Howard Edgerton, duly *accepted.*

Thereupon, on the 27th day of April, 1942, the Court sentenced the defendant, J. Howard Edger-

ton, to serve a term of two and one-half years in the Federal Penitentiary as designated by the Attorney General of the United States, on each of counts 1, 4, 6, 8, 11 and 13 of the indictment, each of said sentences to run concurrently with each other, and not consecutively, and further ordered that the defendant, J. Howard Edgerton, be placed on probation under the supervision of the Probation Officer for a period of five years on each of counts 2, 5, 7, 9, 12 and 14 of the indictment. Each of said probation periods to run concurrently with each other and to commence at the expiration of the service of sentence on count 1; and the Court further ordered that the imposition of further sentence on said Counts 2, 5, 7, 9, 12 and 14 be suspended. [805]

Thereafter, and upon the 25th day of May, 1942, which is within the time provided by the rules of Court, for the presenting, signing and filing of the Bill of Exceptions herein, the plaintiff and the said defendant, J. Howard Edgerton, by and through his counsel, stipulated that the time within which the Bill of Exceptions in said action on behalf of said defendant and appellant, be settled, be extended to and including the 15th day of September, 1942; further that defendant and appellant file his Assignment of Errors and proposed Bill of Exceptions on or before the first day of September, 1942.

Whereupon, the Honorable Ralph E. Jenney, the judge of said court, made and entered on the 25th day of May, 1942, his order wherein and whereby it was ordered that the time within which the Bill of Exceptions in the above entitled action on behalf

of the defendant and appellant, J. Howard Edgerton, be settled, be extended to and including the 15th day of September, 1942, and further, that the said defendant and appellant, J. Howard Edgerton, file his Assignment of Errors and proposed Bill of Exceptions on or before the 25th day of July, 1942, and finally, that the said plaintiff file his proposed amendments, if any, to the Bill of Exceptions on or before the first day of September, 1942. Said order was based upon the stipulation last hereinbefore referred to and good cause otherwise appearing to the said Court. Thereafter, upon the 25th day of May, 1942, an order was duly entered of record, pursuant to stipulation of the parties hereto, that the original documents offered in evidence in said cause that are not herein reproduced be considered as incorporated and as a part of the Bill of Exceptions in this cause as though actually a physical part thereof, and that the same be [806] separately certified by the Clerk of the Court to the United States Court of Appeals in and for the Ninth Judicial Circuit of the United States.

Accordingly, the exhibits mentioned and in evidence herein, which are not set forth in this Bill of Exceptions, the same being separately certified by the Clerk of this Court to the United States Court of Appeals in and for the Ninth Judicial Circuit of the United States, are hereby incorporated and included herein and made a part hereof, the same as if actually herein set out in full. For as much as the matters above set forth do not as

otherwise appear of record, this defendant and appellant, J. Howard Edgerton, tenders this, together with the said original exhibits, as his Bill of Exceptions on his appeal sued out and taken herein by him, which said Bill of Exceptions is all of the evidence received in said cause, and prays that same may be allowed, settled, signed and sealed by the Judge of this Court presiding at the trial, to wit, by the said Honorable Ralph E. Jenney, pursuant to the statute and rules of Court in such case made and provided, to be filed and made a part of the record herein which is done according to law this 9th day of November, 1942, which is within the time heretofore granted by the court, and pursuant to the rules of Court and statute appertaining thereto for the presenting, signing and filing of said Bill of Exceptions herein. (The court has not read the foregoing but rules entirely upon the representations of counsel as officer of this court.)

RALPH E. JENNEY,
Judge of the United States
District Court. [807]

In the District Court of the United States in and for the Southern District of California, Central Division.

No. 14943-RJ Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. HOWARD EDGERTON, et al.,

Defendants.

STIPULATION SETTLING BILL OF EXCEPTIONS

It Is Hereby Stipulated by and between the defendant-appellant J. Howard Edgerton, and the plaintiff-appellee, United States of America, through their respective counsel, that the within Bill of Exceptions be allowed, settled, signed and sealed by the Judge of this court presiding at the trial, to-wit: the Honorable Ralph E. Jenney.

Dated: November 9, 1942.

OTTO CHRISTENSEN,
Attorney for J. Howard Edgerton.

LEO V. SILVERSTEIN,
United States Attorney.

JAMES L. CRAWFORD,
Assistant United States Attorney

Attorneys for United States.

[808]

Received copy of the within Bill of Exceptions, this 22nd day of July, 1942.

JAMES L. CRAWFORD,
Asst. U. S. Atty.
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 9, 1942. Edmund L. Smith, Clerk. By Irwin C. Hames, Deputy Clerk.

Lodged Jul. 22, 1942. Edmund L. Smith, Clerk. By John A. Childress, Deputy Clerk.

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now, J. Howard Edgerton, in connection with his notice filed with the clerk of the above entitled court, stating that he appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgments and sentences entered in the above entitled cause against him on the 27th day of April, 1942, and said defendant, having duly given notice of appeal as provided by law, now makes and files, with the said notice of appeal, the following assignment of errors herein, upon which he will apply for a reversal of said judgments and sentences, and each of them, upon appeal, and which errors, and each of them, are to the great detriment, prejudice and injury of said defendant, in violation of the rights conferred upon him by law; and said defendant says that in the record and proceeding in the above entitled cause, upon the hearing and

determination thereof, in the Central Division of the United States District Court, in and for the Southern District of California, there is manifest error in this, to wit:

I.

Said District Court erred in denying the motion made at the conclusion of the plaintiff's case, and renewed at the conclusion of all the evidence introduced in said cause, to direct a verdict of not guilty on the charge contained in count 1 of the Bill of Indictment herein.

The grounds of said motion, and the grounds of said error in denying said motion, were and are:

1. That the evidence introduced does not tend to prove that the defendant was guilty in manner and form as charged in said count, and is insufficient to support a verdict of guilty.

2. That the evidence is insufficient to establish the essential elements of the crime charged in that,

(a) that there is no substantial evidence, or any evidence, to show that the defendant, J. Howard Edgerton, or any of the other defendants, did depress and/or cause to be depressed, the market price of the securities of the First Security Deposit Corporation, as charged in the indictment, and that as a result thereof the defendants might or did acquire the same from the persons intended to be defrauded at prices greatly reduced from the particu-

lar value thereof, as charged in the indictment.

(b) There is no substantial evidence, or any evidence, to show that the defendant J. Howard Edgerton, or that any other of the defendants herein, did represent to the persons intended to be defrauded that the First Security Deposit Corporation would and did loan or advance money only upon security or properties theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California, as charged in the indictment.

(c) That there is no substantial evidence, or any evidence to show that the defendant J. Howard Edgerton, or that any of the other defendants herein, did convert and divert to their own use, benefit or profit, large sums of money, or any sums of money, or property, of the First Security Deposit Corporation, or of the persons intended to be defrauded, under the pretense of loans, or by any other means or method, as charged in the indictment.

(d) There is no substantial evidence, or any evidence, to show that the defendant J. Howard Edgerton, or that any of the other defendants herein, did falsely represent or pretend that the First Security Deposit Corporation was organized for the purpose of, and duly and actively engaged in the

liquidation of the assets received by it from the Railway Mutual Building and Loan Association, and that pursuant to and under said false representation or pretense did convert said assets to their own use or benefit, as charged in the indictment.

II.

Said District Court erred in denying the motion made at the conclusion of the plaintiff's case, and renewed at the conclusion of all of the evidence introduced in said cause, to direct a verdict of not guilty on the charge contained in count two of the bill of indictment herein.

The grounds of said motion were, and the grounds of said error in denying said motion, were and are the grounds substantially as hereinabove set forth in Assignment No. I as the grounds of error in denying the motion at the close of the plaintiff's case to dismiss Count 1 of the Bill of Indictment herein.

III.

Said District Court erred in denying the motion made at the conclusion of the plaintiff's case, and renewed at the conclusion of all of the evidence introduced in said cause, to direct a verdict of not guilty on the charge contained in Count 4 of the Bill of Indictment herein.

The grounds of said motion were, and the grounds of said error in denying said motion, were and are the grounds substantially as hereinabove set forth in Assignment No. I as the grounds of error in

denying the motion at the close of plaintiff's case to dismiss Count 1 of the indictment.

IV.

Said District Court erred in denying the motion made at the conclusion of the plaintiff's case, and renewed at the conclusion of all of the evidence introduced in said cause, to direct a verdict of not guilty on the charge contained in Count 5 of the Bill of Indictment herein.

The grounds of said motion were, and the grounds of said error in denying said motion, were and are the grounds substantially as hereinabove set forth in Assignment No. I as the grounds of error in denying the motion at the close of plaintiff's case to dismiss Count 1 of the indictment.

V.

Said District Court erred in denying the motion made at the conclusion of the plaintiff's case, and renewed at the conclusion of all of the evidence introduced in said cause, to direct a verdict of not guilty on the charge contained in Count 6 of the Bill of Indictment herein.

The grounds of said motion were, and the grounds of said error in denying said motion, were and are the grounds substantially as hereinabove set forth in Assignment No. I as the grounds of error in denying the motion at the close of the plaintiff's case to dismiss Count 1 of the indictment.

VI.

Said District Court erred in denying the motion made at the conclusion of the plaintiff's case, and renewed at the conclusion of all of the evidence introduced in said cause, to direct a verdict of not guilty on the charge contained in Count 7 of the Bill of Indictment herein.

The grounds of said motion were, and the grounds of said error in denying said motion, were and are the grounds substantially as hereinabove set forth in Assignment No. I as the grounds of error in denying the motion at the close of plaintiff's case to dismiss Count 1 of the indictment.

VII.

Said District Court erred in denying the motion made at the conclusion of the plaintiff's case, and renewed at the conclusion of all of the evidence introduced in said cause, to direct a verdict of not guilty on the charge contained in Count 8 and 9 respectively of the Bill of Indictment herein.

The grounds of said motion were, and the grounds of said error in denying said motion, were and are the grounds substantially as hereinabove set forth in Assignment No. I as the grounds of error in denying the motion at the close of plaintiff's case to dismiss Count 1 of the indictment.

VIII.

Said District Court erred in denying the motion made at the conclusion of the plaintiff's case, and renewed at the conclusion of all of the evidence in-

troduced in said cause, to direct a verdict of not guilty on the charge contained in Count 11 of the Bill of Indictment herein.

The grounds of said motion were, and the grounds of said error in denying said motion, were and are the grounds substantially as hereinabove set forth in Assignment No. I as the grounds of error in denying the motion at the close of plaintiff's case to dismiss Count 1 of the indictment.

IX.

Said District Court erred in denying the motion made at the conclusion of the plaintiff's case, and renewed at the conclusion of all of the evidence introduced in said cause, to direct a verdict of not guilty on the charge contained in Count 12 of the Bill of Indictment herein.

The grounds of said motion were, and the grounds of said error in denying said motion, were and are the grounds substantially as hereinabove set forth in Assignment No. I as the grounds of error in denying the motion at the close of plaintiff's case to dismiss Count 1 of the indictment.

X.

Said District Court erred in denying the motion made at the conclusion of the plaintiff's case, and renewed at the conclusion of all of the evidence introduced in said cause, to direct a verdict of not guilty on the charge contained in Count 13 of the Bill of Indictment herein.

The grounds of said motion were, and the grounds

of said error in denying said motion, were and are the grounds substantially as hereinabove set forth in Assignment No. I as the grounds of error in denying the motion at the close of plaintiff's case to dismiss Count 1 of the indictment.

XI.

Said District Court erred in denying the motion made at the conclusion of the plaintiff's case, and renewed at the conclusion of all of the evidence introduced in said cause, to direct a verdict of not guilty on the charge contained in Count 14 of the Bill of Indictment herein.

The grounds of said motion were, and the grounds of said error in denying said motion, were and are the grounds substantially as hereinabove set forth in Assignment No. I as the grounds of error in denying the motion at the close of plaintiff's case to dismiss Count 1 of the indictment.

XII.

Said District Court erred in denying the motion made by said defendant and appellant, after the jury had returned its verdict in the above entitled cause, finding him guilty on counts 1, 2, 4, 5, 6, 7, 9, 11, 12, 13 and 14, for judgment therein, for order arresting judgment on each of said counts, 1, 2, 4, 5, 6, 7, 9, 11, 12, 13 and 14, of the Bill of Indictment.

The grounds of said motion were and the grounds of said error in denying said motion were and are:

1. That there has been no verdict against the defendant sufficient to sustain a judgment of

conviction or a sentence thereon, inasmuch as the purported verdict returned by the jury is not a verdict based upon the indictment returned by the grand jury in this case.

2. That on the 3rd day of April, 1942, this court lost jurisdiction to further proceed with this case in any respect, and did not have jurisdiction to receive the purported verdict of the jury herein, and has not, subsequent to April 3, 1942, had any jurisdiction whatsoever in this action, for the reason that on said date the court in an instruction to the jury changed the indictment returned in this case by the grand jury, and required this defendant to be tried by the trial jury upon an indictment altered and different from the one returned by the grand jury, said instruction being given by the court on said date in the following language:

"The Court: The indictment in this case contains certain allegations which now, at the conclusion of the trial, the Court believes should be withdrawn from your consideration for reasons which it deems sufficient as a matter of law. Allegations which are immaterial to a determination of the issues may be considered to be surplusage and it may be for that reason that the Court is impelled to direct you to disregard them or there may be no proper evidence introduced in support of such allegation.

"You are instructed to disregard the following words taken from the first paragraph on Page 5 of the indictment, beginning on the

fourth line of said paragraph and page to wit: 'theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California.' This paragraph will then read, and you are to consider it as reading as follows:

" 'That the defendants would and did represent to the persons intended to be defrauded that the first Security Deposit Corporation would and did loan or advance money only upon security or properties; whereas in truth and in fact, as the defendants, and each of them, then and there well knew, large sums of money and property belonging to the said corporation were loaned and diverted to the defendants and to Investment Finance Company for the use and benefit of the defendants without any security whatsoever.'

"No proof was offered upon that particular clause of that paragraph and I regard it as surplusage."

3. That the court erred in striking from the indictment the following language appearing on page 5 of said indictment:

"Theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations",

for the reason that this defendant was entitled to be tried by the indictment as rendered by the grand jury in this case, and the action of the court hereinabove enumerated deprived this defendant of the rights guaranteed to him by

Article V of the Amendments to the Constitution of the United States.

4. That the court erred in treating that portion of the indictment hereinabove quoted as surplusage.

XIII.

Said District Court erred in giving the following instructions to the Jury:

"The indictment in this case contains certain allegations which now, at the conclusion of the trial, the Court believes should be withdrawn from your consideration for reasons which it deems sufficient as a matter of law. Allegations which are immaterial to a determination of the issues may be considered to be surplusage and it may be for that reason that the Court is impelled to direct you to disregard them or there may be no proper evidence introduced in support of such allegation.

You are instructed to disregard the following words taken from the first paragraph on Page 5 of the indictment, beginning in the fourth line of said paragraph and page, to wit:

'theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California.'

This paragraph will then read, and you are to consider it as reading, as follows:

'That the defendants would and did represent to the persons intended to be defrauded that the First Security Deposit Corporation

would and did loan or advance money only upon security or properties; whereas in truth and in fact, as the defendants, and each of them, then and there well knew, large sums of money and property belonging to the said corporation were loaned and diverted to the defendants and to Investment Finance Company for the use and benefit of the defendants without any security whatsoever.'

No proof was offered upon that particular clause of that paragraph and I regard it as surplusage.''

The exceptions with respect to the foregoing instructions were as follows:

"Mr. Irwin: Then, your Honor, on this one I don't know if this is a proper one for an exception, or whether it should be reached another way. If I may state it, it is with reference to the lines that your Honor struck out on Page 5.

The Court: Yes, this is the time to do it, and make an objection to that, and take an exception.

Mr. Irwin: Yes, your Honor. I am quite in accord with your Honor on the evidence, but the objection is made that the instruction should be that the whole allegation, since the evidence doesn't show any proof, should be deleted, and that it should not be left amended.

That is my objection.

The Court: The objection will be overruled, and an exception allowed.

Mr. Campbell: If the court please, in that connection, do I understand your Honor's instruction was that simply there is no proof on that portion of the allegation which was stricken, that is to say, to be approved by the Commissioner.

The Court: My view was that because of the peculiar formation of that paragraph by the Superintendent of Banks and the State Corporation Department could be deleted, and still the paragraph contains a charge proper in the indictment.

Mr. Campbell: Yes.

The Court: That therefore that was surplusage. If that couldn't have been, I would have stricken the whole paragraph.

Now, the objection made by Mr. Irwin, that same objection may be deemed to have been made by all defendants and overruled, and an exception allowed, because it is a proper point, and it should be saved."

XIV.

Said District Court erred in refusing to charge the jury as requested in defendants and appellant's Instruction No. 87,

(Defendant J. Howard Edgerton's Requested Instruction No. 87)

"You are instructed that the term 'market value', as the words thoroughly import, indi-

cates price established in a market where the article is dealt in by such a multitude of persons and such a large number of transactions as to standardize the price. Proof of such market value can only be made by one of the recognized methods of proving the price current in a market. Individual dealings are not competent to prove it."

An exception was duly taken upon the conclusion of the instructions to the jury to the court's failure to give said instruction.

XV.

Said District Court erred in refusing to charge the jury as requested in defendant's and appellant's Instruction No. 88,

(Defendant J. Howard Edgerton's Requested Instruction No. 88)

"You are instructed that the indictment in this case charges that the defendants did depress and cause to be depressed the market price of the securities of the First Security Deposit Corporation. You are further instructed that there is no evidence in this case proving the market price, or prices, of the securities of First Security Deposit Corporation, and as a consequence thereof, the government has failed to prove that the defendants, or either of them, did depress or cause to be depressed the market price of said securities."

An exception was duly taken upon the conclusion of the instructions to the jury to the court's failure to give said instruction.

XVI.

Said District Court erred in refusing to charge the jury as requested in defendant's and appellant's Instruction No. 89,

(Defendant J. Howard Edgerton's Requested Instruction No. 89)

"You are instructed that there is no evidence proving that the defendants, or either of them, did convert, or divert to their own use, benefit, or profit large sums of money or property of the First Security Deposit Corporation, or of the persons described as those who were intended to be defrauded, under the pretense of loans, or by any other way or method, as charged in the indictment."

An exception was duly taken upon the conclusion of the instructions to the jury to the court's failure to give said instruction.

XVII.

Said District Court erred in refusing to charge the jury as requested in defendant's and appellant's Instruction No. 91,

(Defendant J. Howard Edgerton's Requested Instruction No. 91)

"You are instructed that the defendants, or either of them, did not represent to the persons described in the indictment as those intended

to be defrauded, that the First Security Deposit Corporation would and did loan or advance money only upon security or properties theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California."

An exception was duly taken upon the conclusion of the instructions to the jury to the court's failure to give said instruction.

XVIII.

Said District Court erred in denying the motion of the defendant to instruct the jury to disregard the statements hereinafter set forth made by the plaintiff during the course of its opening argument to the jury, and in overruling the objections of the defendant thereto. Said statement of plaintiff, motions to disregard, and objections, and ruling of the Court, were as follows:

"Mr. Campbell: The indictment goes on to say:

'That the defendants did depress and cause to be depressed the market price of the said securities of First Security Deposit Corporation so that defendants might and did acquire the same from the persons intended to be defrauded at prices greatly reduced from the par value thereof, directly or through the agency of one or more of said companies and through the agency of companies whose names are to the Grand Jurors unknown, and with funds

which belonged to and were feloniously and unlawfully withheld and diverted from said persons intended to be defrauded.'

And I submit to you, gentlemen, that the record is replete with evidence which showed that through their actions these defendants caused a situation to prevail wherein the security holders obtained less than the real value of their securities.

Mr. Lawson: I take exception to that remark, your Honor, and assign it as prejudicial error; that the jury be instructed to disregard it. There is no evidence in this case, either as to the actual value or the market prices of the securities.

Mr. Irwin: I join in that exception, your Honor, and I assign it as misconduct.

The Court: Will you read the statement, please?

Mr. Butler: Your Honor, on behalf of the defendant Cronk and on behalf of the Defendant Twombly I join in that citation of error.

The Court: Read the sentence, please."

(The record referred to was read by the Reporter.)

"The Court: The objection will be overruled. The jury are instructed that counsel is arguing the evidence as he sees it, and he is simply, in effect, saying to you—and I shall ask him to correct me if I am not stating him correctly—in substance that the various items of evidence, which have been produced before you, indicate

that the situation was caused whereby these people intended to be defrauded, and other persons indicated in the indictment, were not able to get as high a price for their securities in the sale of them as they would have been had it not been for the activities of these various defendants.

Mr. Campbell: Yes, your Honor. I thought in substance I so stated.

Mr. Irwin: Recognizing my responsibility, may I respectfully take exception to the Court's statement? I feel that I should assign the statement as error, if I may, at this time.

The Court: You may.

Mr. Lawson: I will join in that exception, your Honor."

XIX.

Said District Court erred in permitting the plaintiff, during the course of its opening argument, to make the following improper and prejudicial statement:

"Mr. Campbell: Gentlemen, I am going to take a short period of your time when we resume again, which I understand will be Tuesday morning. While I want you to understand, as has been told you from time to time throughout this case, that the plaintiff believes that in fairness to these defendants you should not make up your minds in this case until you have heard all of the arguments, until you have heard the instructions of the Court, and the matter has

been submitted to you; nevertheless, it is entirely proper, I believe, for you to consider these facts to yourself, that have been produced here in evidence before you, and I hope that each one of you, during this week-end, if you have the opportunity and time to do so, will think over to yourself the matters which I have called to your attention today: matters which are here in the evidence of this court, matters which stand on the record of this court; and, particularly, those matters in which there has been no contrary proof.

Mr. Irwin: If your Honor please, I wish to assign that last statement of counsel, directed to the jury, as prejudicial misconduct.

Mr. Lawson: I will join in that, your Honor.

The Court: Assignment denied; exception allowed."

XX.

Said District Court erred in his rulings with respect to certain motions and objections made to portions of remarks of the plaintiff during its closing argument and in his comments with respect thereto, as follows:

"Mr. Campbell: Now it was stipulated here that the investors did not sign the plan itself but that a brochure was circulated among the depositors of the Railway Mutual and in it there was an authority or consent to the plan with an instruction that they might go to the office of the company and examine the document if they so wishes.

Now, gentlemen, it is the contention of the Government that it doesn't make any difference whether one, none, or 5,000 investors went down and actually examined that plan. The representation was there and it was meant for anyone who examined the plan, and they were all invited to examine it. And when reference was subsequently made from time to time to this plan of agreement, and the people were told that that was being done or was going to be done, it was done with reference to and according to that plan and under its terms, they had the right to believe that that was so and that that was being done.

Now the evidence here in this case shows, as I recall, only one change, and that was with reference to a bond which was to be given. If any other changes were made I don't know where they are in evidence.

But the investors, in the absence of the change of those provisions, had the right to rely upon the fact that such representations and promises would be kept at all times.

It is a very similar situation—you gentlemen have had corporate experience, and you are aware of the fact that whatever type of corporation you set up you don't know what the future contingencies your company is going to have to go through. If you are forming a corporation, let's say, for a grocery store, it may be in the future that you may want to own the real property where your grocery store is

located, or you may want to branch out and have several grocery stores. So although the purpose of your corporation and your object is to have a corporation operating grocery stores, yet you reserve and set forth a number of rights which you maintain and retain so that when those contingencies arise, they can be taken care of.

In other words, let us use this illustration: Suppose some friend comes to you and says, 'My friend, I have just organized a company down here called the A. B. Grocery Company. I am going to buy a chain of three grocery stores and operate them. It looks like a good business, and you put your money in and we will be in the grocery business. That is the purpose and object of my company, and that is what we are going to do with the money.'

So, you put your money in with him. Time goes by and you wonder how the grocery business is getting along, so you go down to find out about it. But you find that instead of any grocery stores, that you friend is operating a hotel and you say, 'Well, where is our grocery business?'

And he says, 'Well, this is our grocery business. We are operating this hotel.'

And you say, 'Wait a minute. I put in my money to operate a grocery business. This was the object and purpose.'

'Oh, no' says he, 'Look down here in para-

graph 83. The corporation reserves the right to own and operate real property, and that is what we are doing.'

Now, that is very similar, gentlemen, for practical purposes to the situation we have here. These people were told, or at least they were intended to be told, and for practical purposes they were told through this plan and agreement that the money would be invested in certain ways.

Mr. Irwin: Pardon me. I cite that last statement of counsel as deliberate misconduct and ask the Court to instruct the jury to disregard it.

The Court: Read the statement, please.

(The record referred to was read by the reporter)

Mr. Irwin: There is no evidence at all that that plan was ever communicated to anybody and I assign that, most respectfully, as misconduct.

The Court: Now, I don't so understand the evidence. I understood the evidence that this plan was called to the attention of those who made the exchange of Railway Mutual Building and Loan stock into the First Security Deposit Corporation stock; and that the text of that plan was available to all of them.

Mr. Irwin: True, your Honor——

The Court: And it has been relied upon in argument of nearly all of defendants' counsel

in connection with their arguments as to what the First Security Company could do under the plan.

Mr. Irwin: Very true, your Honor, but when the misstatement is made that those representations were directed to any of these victims, there hasn't been a one of them who got on the stand and testified that he ever heard or read of it other than what is contained in the brochure and it would be admitted that there is nothing in the brochure about any of the details of the plan.

The Court: I think you are mistaken about that. I am satisfied that I heard the question asked of these witnesses on the stand if they deposited in accordance with the plan and they made reference to the plan."

XXI.

Said District Court erred in overruling the objections and exceptions of the defendants to certain questions propounded to the plaintiff's witness Bruce on direct examination and permitting said witness to answer as follows:

"Q. Will you state by years the principal amount of bonds acquired by First Security Deposit Corporation, segregating those amounts into first, the total face of bonds acquired, the total amount of bonds discounted; first, as to the face, or principal amount; secondly, as to the amount paid for such discounted bonds; thirdly, as to the average rate paid; stating

the face amount of bonds received on loans or escrows; stating in addition the bonds paid off by First Security at 100 per cent during the course of such year and during such periods or years as bonds were acquired from the Investment Finance Company; stating the figure or price at which received; stating whether or not they were received in exchange for real estate, in exchange for trust deed, or applied on principal or interest on debts owing from the Investment Finance Company to the First Security Deposit Corporation; and stating in addition thereto any interest added to the face amount of such bonds and allowed to Investment Finance Company.

Mr. Lawson: Your Honor, it is rather a long question to anticipate every part of it. There is no objection, of course, to the face amount of the bonds acquired, nor as to the statement of the amount by years. There is an objection to the statement of any amounts acquired at discounts unless the discount is with reference to the market prices. That is a discount below the market prices as alleged in the indictment. The same would apply to the average amount of discounts, unless the average amount of discounts would be those discounts below the market price or prices; not within the issues of the case; it is immaterial.

The Court: Read the question.

(The question referred to was read by the reporter)

* * * * * * *

Mr. Lawson: The objection is that any statement by this witness or any evidence relative to discounts or any related matters involving discounts is immaterial and incompetent, and not within the issues of this case unless it be shown that the discount or discounts were below the market prices as referred to in the indictment, and particularly on page 4, the third paragraph from the top; that is, unless it be shown that the discount was from the market price, that it has no place within the issues of this *place* in any Count of the indictment. Any other discount is not alleged as part of any scheme.

Mr. Campbell: Possibly there is some confusion in the use of the word 'discount.' My use of the word in the question to the witness is as to the difference between the price paid as disclosed by the books and the face amount of the securities, and I will reframe my questions so that that word is eliminated and in connection with the indictment which alleges that the defendants did depress and cause to be depressed the market price of the said securities of the First Security Deposit Corporation so that defendants might and did acquire the same from the persons intended to be defrauded at prices greatly reduced from the par value thereof.

This evidence is going to the acquisition at a price less than the par value thereof, and

not as to the first portion as to their actual depressing or causing to be depressed.

I think that statement will probably clarify the use of the word 'discount' to which counsel's objection is apparently addressed.

* * * * * * *

The Court: Well, may we not take the question as it has been read, which seems to be clear, with the added feature that the discount is the discount below the face of the bonds to which he is referring, and then your objections would be pertinent.

Mr. Irwin: * * * I join in the objection of Mr. Lawson, and add the additional objection which I made a moment ago, and I likewise wish to add the further objection that it is hearsay as to the defendants, if I didn't mention that before, and no foundation has been laid."

(The following proceedings were had between court and counsel.)

"Mr. Irwin: I am directing my attention to paragraph 3 page 4, directing my attention particularly to the objection as to the immateriality and the lack of foundation. The other objection is hearsay. They require no comment at this time as they go under the regular subject that has come up, properly subject to a motion to strike.

Your Honor will note the phrase there, I respectfully submit that is conjunction: 'De-

fendants did depress and cause to be depressed the market price of the said securities of First Security Deposit Corporation so that defendants might and did acquire the same from the persons intended to be defrauded at prices greatly reduced from the par value thereof.'

I submit, your Honor, that we have no evidence, there hasn't been a single item of evidence, tending to support the first part of the conjunctive statement, namely, that they did everything, at any place along the line, to cause these to be depressed.

I submit, therefore, your Honor, that it then is immaterial. The mere fact that the bonds had a face value of $100 and might have been bought for $40 itself does not tend to prove or disprove any of the issues set forth in that conjunctive allegation.

The Court: That was the thing that I wanted to bring specifically out into the record because of the wording of this indictment and the wording of the question.

It seems to me that there are two necessary phases of proof in that paragraph in the indictment. If it could conveniently be done to put the first in first, that would be all right, but I don't see that there is any particular necessity for it so long as it comes forward before the end of the case.

The first element is 'That the defendants did depress and cause to be depressed the mar-

ket price of the said securities.' That is the first element.

The second element is they did that 'so that defendants might and did acquire the same from the persons intended to be defrauded at prices greatly reduced from the par value.'

Now, both elements have got to be proven.

You see that 'did' is the element in there. The Government has got to prove that they did because they have alleged that they did and this is the proof.

Mr. Irwin: I appreciate that the Court does have in mind unless we get that first allegation there——

The Court: That is an important allegation in the indictment, and proof will have to be coming in to connect those two together in order for the Government to make its case, and then if they don't, you can move to strike.

Mr. Irwin: Then the ruling is the question is considered as still being in the record so these objections may not be repeated.

* * * * * * *

Then do I understand, your Honor, that the question is reinstated, as originally stated by Mr. Campbell with the deletion of the phrase 'discount.'

The Court: With the explanation of what he means by that phrase.

Mr. Irwin: That is still before the Court.

The Court: That is right.

Mr. Irwin: And the objections made by Mr. Lawson and myself and Mr. Adams to that question are overruled and exception allowed, subject to the motion to strike.

The Court: That is right. As to all defendants.

Mr. Lawson: I might state my position with reference to that is that the price at which the bonds were acquired must necessarily be below the market price.

The Court: Ultimately they have got to prove that under their indictment there, either by direct or other evidence, but there are two elements to this, and this proof is directed to the second element of the third paragraph on page 4 of the indictment.

Mr. Campbell: We are only proving the ultimate fact of the price at which they were acquired by this witness, not what the market price was or should have been.

* * * * * * *

Mr. Irwin: I overlooked one additional point, so that the Court will have it in mind. In connection with the objection of immateriality, that phrase in the indictment is 'So that defendant might and did acquire.' All this testimony is going to show what the First Security acquired as a corporation. I think counsel will agree that this question does not call and will not develop an answer that any of the defendants acquired the shares.

The Court: It says 'directly or through the

agency of one or more of said companies and through the agency of companies whose names are to the Grand Jurors unknown.' There is that limitation as to companies.

That objection will also be overruled subject to the same objection and same ruling.

Mr. Irwin: So we won't have to interrupt again, I am anxious to have this come in as coherently as possible, might it be understood that the objection runs to the whole line of testimony and need not be repeated?

The Court: Yes.

Mr. Campbell: So stipulated.

The Court: Now the question with the explanation and the objection will be re-instated, and you may answer."

Thereupon the witness testified with respect to the result of his examinations for each of the years 1932 to and including 1939. Whereupon the following question was asked and the following answer given:

"Q. Mr. Bruce, will you give us a total of the figures which you gave heretofore from the period November, 1932, to December 31st, 1939?

A. Total face value principal amount to bonds acquired amounted to $1,267,649.15, of which amount discounted bonds at a face principal amount of $648,125.02, for which the First Security paid $238,069.35 for an average rate of 36.7 per cent. That is to say, 36.7 per

cent of the face amount of such bonds. Bonds received on bonds, or escrow, at one hundred per cent amounted to $189,508.59. Bonds were paid off one hundred per cent $195,571.40. Bonds received from the Investment Finance Company for the following purposes: the cost bonds leaving a principal amount of $6,495.85 for which Security paid Investment $3,036.79. In exchange for real estate bonds leaving a face principal amount of $21,511.38. In exchange for First Trust deeds bonds leaving a principal amount of $49,996.81.

Bonds acquired on the debt or interest due First Security, $162,925.95. Interest added to bonds traded for first trust deeds are applied on the debt or interest due on the debt in the amount of $36,217.25."

The witness further testified: The total face amount of bonds acquired by First Security in the summer of 1934 amounted to $22,504.79; of this amount, discounted bonds had a face principal amount of $21,332.06; for which the First Security paid $6,565.42 for an average rate of 31 per cent. Bonds received on loans or escrow 100 per cent amounted to $1,172.73.

Thereupon, over a similar objection, ruling and exception, the witness was similarly permitted to answer the following question with reference to the Investment Finance Company as follows:

"Q. Mr. Bruce, will you state by years the face value of bonds of the First Security De-

posit Corporation acquired by the Investment Finance Company; the amount of cash paid therefor by the Investment Finance Company; and the average rate applied; that is to say, the average of the face value for which they were acquired; the amount of interest added thereto while in the possession of Investment Finance Company; stating also the disposition of such bonds by the Investment Finance Company, and in such connection stating the face amount of bonds turned over to the First Security Deposit Corporation; stating the cost to Investment Finance Company; the application made of such bonds; and the total paid or allowed Investment Finance Company by First Security Deposit Corporation for such bonds; and state the figures slowly, if you will, so that counsel may follow you."

The witness was then permitted to state the aggregate figures for the period of 1935 to and including 1939 as follows:

"Q. Will you state, Mr. Bruce, the total face amount of bonds of the First Security Deposit Corporation acquired by the Investment Finance Company during the existence of that company? A. $240,929.99.

Q. And what amount of those bonds were purchased at a price less than the face amount thereof? A. $232,889.33.

Q. What was the cost to Investment Finance Company of that $232,889.33 worth of bonds? A. $169,672.09."

XXII.

The said District Court erred in overruling defendant Edgerton's motion to strike the testimony of said Plaintiff's witness Bruce referred to in the foregoing assignment of error No. 21, at the conclusion of all of the evidence in the case, upon the following grounds, that the same is:

"1. Hearsay.

2. Incompetent.

3. Not binding upon the defendant Edgerton, nor connected with him.

4. Containing statements of matters not involved within the issues of the case.

5. Statement of opinion and not of fact.

6. Statements of summaries based in part upon immaterial matters, while purporting to be a summary of facts based upon material matters.

7. Insufficient foundation."

That in this connection said written notice of the Defendant Edgerton recited the following:

"We also call to the attention of the Court that the summaries of Mr. Bruce, particularly with reference to discounts and profits and loss, are based upon a discount from the par value of the securities, and not on a discount from the market prices thereof."

And exception was duly noted to the court's ruling in denying said motion to strike.

XXIII.

Said District Court erred in sustaining the objections of the plaintiff propounded to the Plaintiff's witness Kate O. Wright on cross examination as follows:

"Q. Calling your attention to Government's Exhibit 145, which is a letter dated March 30, 1937, that in part reads: 'We now have available funds with which to purchase First Security Deposit Corporation bonds and for a limited period will pay the best cash market price available to any who desire or need money at this time for current needs or other investments.'

After the receipt of that letter, did you make any effort to determine what was the market price of those securities?

Mr. Campbell: Objected to as incompetent and improper cross examination, and immaterial. * * * Assuming that investigation was made and that it either did or did not, as far as her investigation was concerned, disclose the truth or the falsity of that representation, that would not only be hearsay, but it would not in any degree reflect upon either the guilt or innocence of the defendants here.

Mr. Lawson: I am bearing in mind the announced purpose that counsel made to your Honor for the introduction of the correspondence, what he intended to prove by that correspondence.

Mr. Campbell: Yes. My announced purpose

is to show that the statements made to this witness were false, but any investigation or hearsay which she obtained, proving or disproving its falsity would not be a material element and it certainly is not proper cross examination.

The Court: Well, I follow your reasoning and I am inclined to agree with you on the last objection as not proper examination. I won't say what position I will take as to the other matters when they come in as part of the defense.

Even so I think this particular question is proper on cross examination, this one that she may answer yes or no. Will you please read that question once more?

You may answer that question as yes or no: Did you make any investigation?

The Witness: I believe not.

By Mr. Lawson:

Q. Did you consult Mr. Richmond with refernece to that matter as to market price?

Mr. Campbell: I object to that as incompetent and immaterial.

The Court: Objection sustained as not proper cross examination."

(To which ruling of the court, the defendants duly took an exception.)

"Q. Now, I call your attention to Government's Exhibit No. 146, which is a letter dated April 8, 1937, addressed to the Investment Finance Company. This is a copy, but bearing

a signature, or a typewritten name, 'Kate Orwall Wright,' and call your attention to this part of it. I will read it in its entirety as it is short:

'In reply to your letter of March 30th, regarding the First Security Deposit Corporation stock, will you kindly advise me what the best cash market price is for this stock at the present time?'

Now, I call your attention in connection with that letter, to the further letter, Government's Exhibit 147, dated April 13, 1937, which reads as follows:

'With reference to your letter of April 8, 1937, please be advised that we can enable you to procure the sum of $619.94 for the securities of the First Security Deposit Corporation bearing Nos. A-6721 and A-9344.'

Now, I will ask you if upon the receipt of that letter, dated April 13, 1937, Government's Exhibit 147, that that satisfied your inquiry as to the market price.

Mr. Campbell: Objected to as incompetent and improper cross examination.

The Court: The objection is sustained. The letter speaks for itself."

(To which ruling of the Court, the defendants duly took an exception.)

"Q. Calling your attention to Government's Exhibit No. 152, which is a carbon copy of a letter dated August 9, 1938, which is addressed

to you and signed by the Investment Finance Company—this is the letter of the offer of $662.65—now in response to that letter you sold your bonds for that price, is that correct?

A. Yes.

Q. And you got the money and surrendered the securities? A. I did.

Q. Now at that time did you have any information or independent knowledge of your own as to the market price of those securities?

Mr. Campbell: Objected to as incompetent, improper cross examination.

The Court: Objection sustained."

(To which ruling of the Court, the defendants duly took an exception.)

Said witness Wright on direct examination testified that she was the owner of Certificate A-934, 11 shares of Class A Preferred stock of the face value of $220.00 and a cumulative bond A-6721 of the face value of $854.20 of the First Security Deposit Corporation; and identified Plaintiff's Exhibits 144 to 152, respectively, as letters either received by her from the Investment Finance Company or written by her, or under her instructions, to the Investment Finance Company. With respect to the offer of these letters the plaintiff stated that these letters were

"offered to show that this course of relationship had been established between the company and the witness who is on the stand and which offers were made from time to time of

varying amounts for her stock and certificates."

Plaintiff's Exhibit 145, a letter from the Investment Finance Company to the witness recited that the company had available funds with which to purchase First Security Deposit Corporation bonds and would pay the best cash market prices available to any who desired and that changing market conditions may affect a quotation and that the offer would remain open only for such time as the Investment Finance Company was able to meet the demands under current conditions; Plaintiff's Exhibit 146 is a letter from the witness in reply reciting:

"Will you kindly advise me what the best cash market price is for this stock at the present time."

Plaintiff's Exhibit 147 was an answer to Exhibit 146 and recited:

"Please be advised that we can enable you to procure the sum of $619.00 for the securities of the First Security Deposit Corporation bearing Nos. A-6721 and A-934."

Plaintiff's Exhibit 151, dated July 5, 1938, recites:

"We are able to this time to return to you $640.65"

for Bond No. A-6721; and Plaintiff's Exhibit 152, dated August 9, 1938, to the witness recites:

"Replying to your letter of August 6, 1938 regarding securities of the First Security De-

posit Corporation, Bond No. A-6721 * * * and Certificate No. A-934 * * * we can obtain for you a total of $662.65 for the bond and preferred stock."

The witness further testified on direct examination that after she had received the above correspondence she finally sold her securities to the Investment Finance Company for $662.65.

XXIV.

Said District Court erred in sustaining the objections of the plaintiff to certain questions on cross examination propounded to the Plaintiff's witness George U. Richmond. On direct examination the witness testified he was vice-president of the American National Bank of St. Joseph, Missouri. The witness was then asked on direct:

"Q. Mr. Richmond, as vice president of the bank, did you have occasion to represent Mrs. Kate Orwall Wright in a matter with reference to her securities in the First Security Deposit Corporation?

A. I wrote several letters in her behalf."

The witness further testified that Plaintiff's Exhibit 153 was a letter written by him addressed to the First Security Deposit Corporation under date of July 19, 1938 reciting that one of the customers of his bank held Bond No. A-6729 and Certificate A-934 and inquiring if she should sell the securities on the market at the preesnt time, and "Can you tell us about what she should receive for them";

the witness further testified that Plaintiff's exhibit 155 was a letter addressed to him from the First Security Deposit Corporation dated August 3, 1938, which said letter was a letter replying to the witness' letter under date of July 19, 1938, reciting that "we understand the market on these securities at the present time to be in the neighborhood of 75% of the face on the bonds and 10% on the stock."

The witness testified on cross examination that he was acting for Mrs. Wright in connection with this matter; that in a sense he was her financial adviser; that he talked to her about this transaction; in answer to the question of whether he had made any independent investigation as to the matter, he said: "I wrote several letters to California banks, to Los Angeles banks".

Then the following occurred on cross examination:

Q. You have stated here that in reference to this letter of July 19th, which is Government's Exhibit 153, that you were advising Mrs. Wright in reference to this matter, the matter of the sale of these securities?

A. I said I discussed it with her. I don't know that I gave her any advice as to what to do.

Q. And you said you wrote the letters to Los Angeles banks? A. Yes, sir.

Q. Inquiring, I presume, as to the value?

A. As to the market; yes.

Q. And did you get some replies on that?

A. I did.

Q. Do you have any of that correspondence with you?

A. I don't have it personally. It might be here. I don't know.

Q. You don't know where it is?

A. We have a folder. I think perhaps it is in the hands of the Government."

The witness was asked whether he had any independent recollection as to what information he received from these banks with reference to the sale of these securities, to which the plaintiff objected on the grounds that the same was incompetent and improper cross examination; said objection was sustained, to which ruling of the court the defendants noted an exception.

The witness was then asked after receiving those letters from the banks if he advised Mrs. Wright further with reference to the sale of these securities, to which question the plaintiff objected on the grounds that the same was incompetent and improper cross examination; said objection was sustained, and to which ruling of the court the defendants took an exception.

The witness was asked if after receiving the letter of August 3rd, plaintiff's Exhibit 155, that he gave Mrs. Wright any advice with reference to the contents of that letter; and objection was made that the same was immaterial and sustained by the court, to which ruling of the court an exception was noted.

XXV.

Said District Court erred in admitting into evidence over the objections and exceptions of the defendant plaintiff's Exhibit 46 in full for the purpose of showing that the information contained in said Exhibit was communicated "To certain individuals" in order that the jury "may use that as an element to determine the intent with which the various acts were done" by the various defendants, and in denying the motion of the defendants made at the close of the plaintiff's case and at the close of all of the evidence in the case, to strike said Exhibit and exclude the same from consideration by the jury; and in overruling defendants objections to and in denying his motion to exclude that portion of said Exhibit 46, which contains the comments, opinions and conclusions of the author of said Exhibit, as distinguished from the audit contained therein, from the consideration of the jury.

Said Exhibit 46 consists of a letter and an accompanying report by certified public accountant under date of February 25, 1939, to the Investment Finance Company respecting the examination of the accounts of said company, as of December 31, 1938; said report recites as follows:

"Comments.

Cash

Cash on hand was counted and reconciled to December 31, 1938, and the bank accounts were confirmed by letter and found in order.

Accounts Receivable.

The accounts receivable are presented in detail on Schedule I and total $2,038.69, consisting largely of insurance premiums uncollected by the Wilshire Insurance Agency.

Contracts Receivable.

Contracts receivable as per Schedule II are automobile sales contracts. They are presented on Exhibit A at book value, although more than 50% of the dollar balance at December 31, 1938 have been pledged with the American National Bank of Santa Monica as security for a loan which at that date amounted to $8,700.00.

Notes and Loans Receivable.

Of a total of $48,413.27 in notes and loans listed in Schedule III, $37,400.00 is unsecured. In fact, the largest single note of $16,650.00 is signed by Battelle-Dwyer & Co. which, it is understood is no longer in existence.

Investments.

Schedule IV is a presentation of the securities into which the company has put most of its funds, obviously more for purposes of control of the various companies concerned than for income from the securities themselves. Most of the investments have been in the common stocks (or voting stocks) of the various companies upon which little or no dividend income has yet been realized.

Pledge Agreement—California Federal Savings & Loan Securities

The item of securities owned in the Cali-

fornia Federal Savings and Loan Association which is carried at $15,000.00 is subject to a pledge agreement of the liquidated Consolidated Investors Corp. with one F. E. Jones, and is secured by the deposit with this company of the following shares of stock in this company.

W. S. Brayton (has not been assigned to Investment Fiance)	5,000 shares
R. W. Starr	2,500 shares
A. R. Ireland	5,000 shares
J. H. Edgerton	1,666 shares
F. A. Anderson	1,200 shares
Ed C. Thomas	1,160 shares
Total shares Hypothecated	16,526 shares

The above listed individuals are all the endorsers of the said pledge agreement. This agreement apparently was originally intended to terminate on July 23, 1939, but it should be noted that there was a typographical error on the agreement itself so that it actually reads July 23, 1936.

Deed of Trust—Pacific Brick Co.

Interest has been accrued to August 1, 1938 on a first trust deed on all the property of the Pacific Brick Co., which was the approximate date of acquisition by this company.

Real Estate.

The real estate shown on Exhibit A at $5,608.19 consists of a house built for resale. It is mortgaged to the extent of $3,673.18 as shown under First Trust Deed Payable.

Accounts Payable—First Security Deposit Corporation

This account has gradually been built up to its present figure over the past three years by numerous advances from First Security Deposit Corporation on open account without security. Interest has been paid at the rate of 3 per cent per annum, but this interest has been paid in bonds of the First Security Deposit Corporation at face value, thus reducing the effective interest rate because all such bonds purchased by this company have been acquired at a substantial discount.

Inter-locking Schedules.

Schedules V and VI respectively, show the inter-locking stockholders and directors of the eight related companies. Schedule V is presented on transparent paper so that the two charts may be considered either jointly or separately. Only those stockholders or directors are included on the charts who are connected with two or more of the companies involved.

Schedule VII presents inter-company financial *objections* with amounts. The broken lines indicate unsecured obligations and the solid

lines indicate obligations which are either fully or partially secured.

General.

With reference to the 'Noon deal' mentioned on page 2 of comments, no attempt was made to verify the present status of the note or pledge agreement. It would appear to be a doubtful asset at best. It is also possible that the manner of showing the account as Savings and Loan is questionable since probably all the Investment Finance obtained was an agreement or contract rather than the shares themselves.

Possibly the matter of most importance to the Directors should be the prime question of whether or not the company in its entirety is fraudulent. These specific points should be considered by the Directors with the idea of applying constructive remedy if (1) the Investment Finance Co. is a fraud, and (2) is any remedy be available. Certain hypothetical questions are set forth for your consideration.

The questions propounded are based on the unquestioned fact that (1) control and ownership of this company and the First Security Deposit Corporation are so closely interlocked as to appear identical in effect (see Schedules V, VI and VII); (2) profits which might accrue to the First Security Deposit Corporation would be diverted to the narrower limits of the fewer shareholders of the Investment Finance Co., to the loss of shareholders in the former company; and (3) funds used to promote the

various enterprises were basically the funds of the First Security Deposit Corporation.

These questions, then, should be answered, and do they constitute fraud:

(a) The purchase of First Security Deposit Corporation bonds at a discount, and the re-sale of these securities to that company at par, including accrued interest, retaining the profits in Investment Finance when, in practically no instance, had the First Security Deposit ever paid face value to others?

(b) Taking over the Wilshire Insurance Agency, and diverting commissions formerly earned by the First Security Deposit into the income of the Investment Finance?

In addition to these questions there might be raised the more general one of whether, since in acquiring funds from Security—which funds were in most instances profitably invested—the re-investment in such mismanaged enterprises as Bonds-17, for example, might on its face be construed to be fraud and mismanagement regardless of the answers to the hypothetical questions propounded above.

It would also appear that perhaps in some instances letters sent out by Mr. Cronk might be criticized as being misstatements of fact, and still further, might bring the company under the S.E.C. because they were sent through the mails out of the state.

In summarizing, it would appear that it

might be difficult to justify legally, the existence of the company in any particular, as it is now operating. As your auditor, I wish merely to direct the above matters to your attention, realizing that you have no doubt considered them before."

The grounds of said objections and motions to exclude were:

(A) That same was immaterial and not pertinent to any issue tendered by the indictment in that:

1. The completed offense charged in the indictment is the advancing of money or property to the Investment Finance Company.

2. There is no evidentiary value insofar as the scheme itself is alleged in the indictment.

(B) Relates to collateral, matters in agreements not related to the scheme charged.

(C) Relates to separate, distinct and isolated ventures.

(D) The same is incompetent and irrelevant; for the reasons,

(1) The same has not tendency to establish the specific intent to violate the law in the manner as described in the indictment and further, that mere state of mind is immaterial to the issues raised by the indictment;

(2) That there is no evidence that the defendant Edgerton had knowledge of said report, and that portions of Exhibit 46, as distinguished from the audit itself, are mere comments, opinions and conclusions by the author of said report, and hearsay.

5. During the course of the reading of said Exhibit to the jury, the Court made the following comment:

> "The Court: * * * This is being introduced, as I understand the position of the plaintiff, to show that this information was communicated to certain individuals. * * * In order that you may use that as an element to determine the intent with which the various acts were done by these various defendants."

At the conclusion of said reading to the jury, the Court made the following statement:

> "Now, gentlemen, I again want to caution you that you are not to consider that audit report (or the minutes) for the truth or falsity of what they contain other than the showing that is indicated, the minutes, that this document was discussed. It has been introduced and been accepted only to show the intent or as one of the elements of intent together with other things that may be introduced during the course of the trial, and you are to keep your mind open even on that element."

XXVI.

Said District Court erred in his rulings with respect to certain motions and objections made to portions of remarks of the plaintiff during its closing argument and in his comments with respect thereto, as follows:

"Mr. Campbell: Mr. Lawson also referred to this statement of Mr. Campbell's (Plaintiff's Exhibit 46) and in his reference to it he says this: 'There is no evidence in this case in the first place to support the charges that are made.'

Now, gentlemen, you will recall the instruction of the Court, and you will recall the limitation placed on this document, that the document itself is not to be considered by you as proving or disproving any of the facts or statements—strike out the 'facts'—any of the statements contained herein. It is not to be considered by you for that purpose.

But let's test out Mr. Lawson's statement, that there is no evidence in the case, no evidence elsewhere to support the charges that are made in this document. I think we are entitled to do that.

Now, let's see. Mr. Dean Campbell starts out to say here, and he propounds certain questions——

Mr. Lawson (Interrupting): Your Honor, and Mr. Campbell, I don't have a copy of my argument, but I think, your Honor, that I did make that first statement and I caught it and withdrew it. That is my recollection, because I didn't want to open it up. Now, am I right or am I wrong.

Mr. Campbell: No you did not Mr. Lawson.

The Court: I remember you making the

statement. Whether you withdrew it or not, I don't know.

Mr. Campbell: I will refer to the record.

The Court: We will have to consult the record.

Mr. Lawson: I assume it wasn't an issue in the case and I didn't want to make it an issue.

Mr. Campbell: The statement appears on page 3134 and the statement is as follows:

> 'Those documents—that document there of Mr. Campbell has been placed before you solely for the purpose of showing the intent of the defendants. Now, I have shown you that there is no evidence in this case, in the first place, to support the charges that are made. The question of intent is more or less now a question of an academic one but, in any event, Mr. Irwin has pointed out to you, from the records, the reaction of these men with reference to that document.
>
> Now, to me, it is sort of a bit of sophistry, shall I call it, to say that should you have any reaction to an instrument of that kind there should be any evidence of it, because when you say that you will have to say you assume either the truth or the falsity of the statements therein contained, which are not before you.'

Then he goes on to say that the defendants acted in the utmost of good faith. That is his

statement. Now, may I proceed, your Honor?

Mr. Lawson: Your Honor, I still think that that statement is subject to the position we have taken, that the truth or falsity of the statements made by Mr. Campbell are not at issue, and if counsel is trying to take a different position, I am certainly going to assign that as misconduct.

Mr. Campbell: I am simply taking the position, if the Court please, that when counsel states that there is no evidence in the case, in the first place, to support the charges that are made, we are entitled to look elsewhere in the case and examine the proof elsewhere as compared to the statements made by Mr. Campbell.

The Court: I find the statement directly made on page 3134, line 19, as read by Mr. Campbell, counsel for the Government, and there is some considerable more along the same line.

What was withdrawn was a statement with regard to Mr. Edgerton.

Now in spite of the fact that that document was not admitted in evidence as proof of the truth or falsity of the statements contained in it, but merely to show the intent, the charge of counsel is that there is, as I understand the charge, in the argument, that there is nothing in the record to substantiate any of those charges.

Now, Mr. Campbell proposes to show the jury that there is something in the record to

substantiate at least some of the charges, and I see no impropriety in it.

Mr. Lawson: Your Honor, I think that the plain interpretation of the statement made there is that there is no evidence to sustain the charges. Now the charges naturally refer to the charges in the indictment.

The Court: I don't so interpret it.

Mr. Lawson: If you will look at the nature of the comments that are made there by Mr. Campbell, they are not in the nature of charges, they are first in the nature of hypothetical questions, and he so states them. He isn't making any accusation, he is simply raising the question.

The Court: You were the one that raised. Let me read it to you.

> 'Now, that brings us to a couple of documents that are in evidence. Gentlemen of the jury, the Court has placed the limitation on that evidence, and I know that you will respect it, and I say this considerately and not with the intention of trying to ingratiate myself into your good graces, but if you weren't the type of jury that you are, I would be hesitant about even permitting you to have a document of that kind before you if I didn't feel as though you would honestly and sincerely respect the limitation and the instructions of the Court with reference to those documents,

because it is important. We are all human. We are creatures of suggestion, suspicion and surmise. We can't help it. Some of us are more than others.

Those documents—that document there of Mr. Campbell has been placed before you solely for the purpose of showing the intent of the defendants. Now, I have shown you that there is no evidence in this case, in the first place, to support the charges that are made.'

Now, you didn't mean charges that were made in the indictment, you meant charges that were made in the letter of Dean Campbell.

Mr. Lawson: That would seem to follow, your Honor—I agree that that is true—but I, of course, didn't intend to open up the matter for discussion. I intended to have it limited to its original purpose, and if the Court will give me an opportunity to reply to Mr. Campbell, I would certainly delight to do that. If he wants to make that an issue in the case, I would like to reply.

The Court: I think you have made it, if it is made at all, and anything that Mr. Campbell may say with regard to the document known as the audit report of Dean Campbell with regard to the statements in that shall not make them in any way evidence.

As I understand it, counsel is simply attempting now, by argument, to show the inaccuracy of Mr. Irwin's statement that there is nothing

in the record to substantiate the statements made in the audit report.

Mr. Campbell: That is right, but Mr. Lawson's statement.

The Court: I see no impropriety in that.

Mr. Campbell: You stated Mr. Irwin's statement. You meant Mr. Lawson's statement.

The Court: Yes.

Mr. Irwin: May I address the Court? I feel I would be derelict if I did not interpose and objection to any comment of counsel occasioned by the remark of other defense counsel as going outside the limited purpose for which certain evidence was received.

The Court: I can't see under what theory of law counsel would be prevented from discussing the evidence, whether Mr. Lawson had raised the issue or not, provided the jury understands that he is not trying to show that the statements in this audit report were true or were false. If you disconnect this in your minds entirely from those statements, then I think there will be no danger.

To attempt to prove directly that any of these statements in the audit report were true, considering it as a piece of evidence, would be improper. But I see no impropriety of counsel going on and arguing to the jury and showing to the jury anything that is properly in evidence. If it is restricted he must stick to the restriction.

Mr. Irwin: May we ask for an exception to that?

Mr. Lawson: Yes, your Honor.

Mr. Campbell: As I stated, I am addressing myself to Mr. Lawson's assertion to you with reference to Campbell's report, Government's Exhibit 46, wherein he states 'Now I have shown you that there is no evidence in this case in the first place to support the charges that are made.'

Now bearing in mind, gentlemen, that this document, and the comments that it makes herein, are not evidence of the truth or falsity of what they state, but let us read these statements and then let us look elsewhere in the record.

Mr. Irwin: That is my objection, your Honor.

The Court: I don't think I will permit you to do that.

Mr. Campbell: I will withdraw that last statement, your Honor.

The Court: If you will just lay that audit report aside and go ahead and show anything else you want to with regard to the evidence, disconnected from the statements contained in that audit report, then I think there will not be the slightest impropriety in it.

Mr. Campbell: Yes, but I think, if the Court please, in view of the reference made to this report by Mr. Lawson, I am entitled to refresh the jury's memory as to the contents of the report.

The Court: Well, you have a perfect right to read that report so long as the jury understands that it is in evidence here only for the purpose of showing intent.

Mr. Campbell: I understand that.

Gentlemen: I am going to refer you to this Exhibit 46, which is here only for the purpose of intent, limited to the defendants Edgerton, Ireland, Smale, Thomas, and Starr, and not as proof of the truth or falsity of anything contained in the report. I wish to read from it.

> 'Possibly the matter of utmost importance to the Directors should be the prime question of whether or not the company in its entirety is fraudulent. These specific points should be considered by the Directors with the idea of applying constructive remedy if (1) the Investment Finance Co., is a fraud, and (2) if any remedy be available. Certain hypothetical questions are set forth for your consideration.
>
> The questions propounded are based on the unquestioned fact that (1) control and ownership of this company and the First Security Deposit Corporation are so closely interlaced as to appear identical in effect (see schedules V, VI, and VII); (2) profits which might accrue to the First Security Deposit Corporation would be diverted to the narrower limits of the fewer shareholders of the Investment Finance Co., to the loss of shareholders in the for-

mer company; and (3) funds used to promote the various enterprises were basically the funds of the First Security Deposit Corporation.'

Now, referring to that document Mr. Lawson has said:

'I have shown you that there is no evidence in this case in the first place to support the charges that are made.'

Now, gentlemen, we have shown you, and Mr. Lawson frankly admitted it, that the defendants had and maintained control of these corporations, including the First Security Deposit Corporation and the Investment Finance Company.

Our evidence has shown you that funds—first, that funds were lent from the First Security Deposit Corporation to the narrower limits—narrower stockholder limits, narrower stock interest limits—of the Investment Finance Company and we have shown you here that those funds were used by the Investment Finance Company to obtain a profit for that company on bond transactions to the loss of the shareholders of the First Security Deposit Corporation. So much for Mr. Lawson's statement.

Mr. Irwin: Your Honor, I assign that last comment by counsel, since he has finished reading, as a direct violation of your Honor's admonition that he is not to comment on the truth or falsity of the statement.

Mr. Lawson: In which we join also, your Honor.

The Court: The exception will be disallowed."

XXVII

Said District Court erred and was guilty of conduct prejudicial to the defendant in suggesting and intimating that the defendants should stipulate to certain facts rather than requiring the plaintiff to prove the same, as follows:

(A) The plaintiff's witness, Frank E. Morgan, testified that he was a deputy county clerk of Los Angeles County and that he had produced the articles of incorporation of the First Security Mortgage Corporation, and amendments thereto, from the official records and files of the County Clerk's office.

"Mr. Campbell: This file, being file No. 51694 of Los Angeles County, being the articles of incorporation of the First Security Mortgage Corporation, together with amendment of said articles changing the name thereof to First Security Deposit Corporation, the original articles having been filed November 25, 1931 and the amendment thereto being filed July 25, 1932, it will be offered as Government's first in order.

Mr. Irwin: I think, your Honor, for the purpose of objection until counsel can examine it, in the interest of time it should be marked for identification at this time and we can examine after the recess. We must, of course, ask leave to examine it before it is received.

If he would just content himself about marking it for identification at this time we could examine it as soon as we conclude here.

Mr. Campbell: May it be marked for identification at this time?

The Court: I am not in the habit of wasting the time of the Court and the jury on examinations of documents. If anybody has any document or record that they intend to produce in evidence, I want them to notify the other side and during the recess or at odd times have them examine it. I will not stop a trial to have any such documents examined. Those must be examined during a recess and not waste the time of the jury. I caution all of you, if you intend to introduce any documents in evidence that are matters of public record, unless you show the Court in advance that the revelation of that will be prejudicial, to show them to the other side in advance and have it stipulated to.

And now, clearly, there is nothing secret about these articles of incorporation and the amendment. They either are or aren't. They should have been stipulated to and this could all have been done in five minutes.

The document will be marked for identification. And I hope by a stipulation the first thing in the morning it may be received in evidence.

(The file referred to was marked as plaintiff's Exhibit 1 for identification.)

The court thereupon made the following statement:

The Court: Very well. Let's proceed. We have a lot of things to take care of without a lot of technicalities. And when a document of that kind is introduced in evidence and shows later it is spurious, it, of course, can be corrected. I am not going to waste the time of myself and the time of the jury while a lot of technical objections that are of no value, except to take the time of the Court and jury, are entered into.

Proceed."

(B) Upon plaintiff's witness Milton Shaw, being sworn to testify, the Court made the following remarks:

"The Court: I think possibly before we start in with this case that I ought to explain to counsel and to the jury what my position will be uniformly in connection with this case in order to save a lot of time.

As I have said in a statement previously in this trial and just immediately, that it is impossible for the Government or for the defendants to prove everything at one time, and it is impossible for proof to be made in either a chronological order or a logical order sometimes because, while the witness is on the stand, instead of recalling him several different times to get matters in either in chronological or logical order, it is better to take all of that which is his testimony and be done with it.

Now in a conspiracy case seldom is it possible to have direct evidence. Sometimes it is as to

parts, and sometimes not. The conclusions have to be arrived at by a series of happenings, what I described in part at least as circumstantial evidence.

Now the admission or non-admission of testimony as it is presented by the Government is largely within the discretion of the Court in the exercise of careful, cautious judgment to protect the rights of the defendants. * * * So as to not waste the time of the jury by having them listen to evidence which I am later going to have to strike, where I feel, from my knowledge of the facts made here and my experience in trying conspiracy cases, that the offer is made in good faith and that there is a reasonable ground to believe that it can and will be properly connected up, I shall admit it, reserving to counsel for the defendants the right at the conclusion of the Government's case to move to strike any evidence which has been admitted but which has not been properly connected as to being binding upon all of the defendants or as to be binding as against a particular defendant on whose behalf the motion is presented to the Court. * * *

* * * Now I don't believe that it is going to be necessary for counsel to continue to take the time of the Court and jury to make the objection that the evidence is being put in out of order, and that the conspiracy hasn't been yet proved, and so on and so forth, where I am reserving to them the right to strike. * * * The

only thing I say is that I shall give you a right to move to strike in the event something isn't connected up. That is going to save every time you get an idea that something isn't in chronological order each one of you getting up and moving to strike on the ground that something else hasn't yet been proved. I am going to give you a right, if it isn't properly connected up, to move to strike that particular evidence.

* * * * * * *

If you are perfectly satisfied that those records are the records of the State Corporation Department and that they are proper records of that department, why waste the time for the four of you to get up and make the objection and compel the Government to go *and the* witness back and put him on the stand and go through the formalities which you know perfectly well they are going to be able to get through just to make a technical point. That is why I objected to an objection to a document from the Secretary of State's office. Why object to an exemplified copy or to any particular copy and compel a lot of time to be taken which, in the long run, is of no value to anyone except the delight of the lawyer to make technical objections and have them sustained.

Mr. Irwin: With all deference to the Court's remarks—I quite agree with your Honor as to the fact that a record is a record of the State —but what that record may contain, I don't know. We have never seen it. It can very

properly accuse somebody that had no relation with this case of the most heinous crime if he sat silent and didn't let counsel note an objection and then in argument read it to the jury.

The Court: Now manifestly it isn't fair, nor is it proper, to bring a whole set of records of the State Corporation Department and expect to have them introduced in evidence without counsel for the defendants having abundant opportunity to examine those records and determine exactly what they contain, because it isn't a question as to whether authoritative records, it is a question of whether they contain matter which may be entirely immaterial, may be scandalous, may be prejudicial, may be hearsay, may be collateral, may have absolutely no bearing upon the trial of this case.

* * * * * * *

You should have an opportunity to examine those and any other documents that are going to be submitted so that we may not have to take the time of the Court and the jury to do it in the court room.

Now they are not yet admitted, and I shall charge you with examining them within a reasonable length of time so that if they are proper they may be admitted in evidence. If they aren't proper, they may be excluded.

You may proceed."

(C) "The Court: Of course, I don't think the Government is required to earmark their testimony as applicable to anything. If it is admissible, it goes in, and it is up to you on cross

examination and on argument before the jury to show that it is not applicable to your particular client or to particular situations.

I see no way, unless we are going to be here to celebrate Christmas and New Year's, to do it otherwise than to get these books before the Court and get them in.

Now, they are there. You can cross examine as to them. You can subpoena these witnesses and bring them in as a part of your own case on defense, if you wish. If there has been any misrepresentation, or if there are signatures or anything of that kind that aren't genuine, all you have to do is to establish that fact and we will strike them out.

But I shan't stay here until Christmas to satisfy a lot of technical niceties. I want to get this evidence in, get it in a way that will be protective to the defendants, but we have to get the evidence in and you must put it in piecemeal and you can't put it in either chronologically or logically in conspiracy cases, as I see it. * * *

Mr. Irwin: * * * If the Government is allowed to dump in the whole thing, then the burden is placed upon the defendants to prove their innocence instead of on the Government to prove their guilt. * * *

The Court: Of course, I can't follow you there at all, because the mere fact that this evidence is in, the jury hasn't seen it, the jury doesn't know what is in there, and it is a long

time before they are going to see it. In the meantime you have your right of cross examination, and if these records, after your examination of them, prove to be immaterial or incompetent or not available as evidence, we will strike them out. But we can conceivably, with five or six technical lawyers, take three weeks on one book. That is just exactly why the Congress decided to get rid of these ultra-technicalities of the admission of books and records of corporations and entries in them.

I have seen technical lawyers keep a court going for three weeks on getting in one book. That has been in the past quite a common experience."

(D) "The Court: I am going to go over this again, and I am going to do it for the final time because I am not going to keep on repeating it.

The way I propose to permit this case to go in—and I shall have due regard for the rights of these defendants—this case cannot all be put in at one time. That is very manifest. It covers many defendants, many transactions, many years, many books, many records. Now, I am not at all sympathetic with the position that it is very harmful before this jury because the jury don't know anything about what are in these books, and certainly no harm can be done.

I am not sympathetic with any surprise with regard to it. It is inconceivable to me that

lawyers would prepare a defense in this case without going to the records of the State Corporation Department and the Building and Loan Commissioner and finding out what they contain. I don't propose to stop the trial and keep the jury here while they examine records which, in the exercise of their duty as the attorneys, they should have examined some time ago, as I am satisfied they did examine. * * * * * * Now I recognize that you gentlemen are retained to defend your clients, and you are doing the very best you conscientiously can to protect their interests. There can be no doubt about that in the minds of anyone. I try to be fair to the defendants, as I am to the Government. I sometimes may seem a little critical of lawyers who try criminal cases because I think they use all the tricks in the bag by way of technicalities, and I usually try to prevent as much of that as I can where I think it is just a waste of time, and where we aren't getting anywhere by it. That is why I made the statement I did when objection was made to the introduction in evidence of a document from the Secretary of State's office."

(E) "Mr. Campbell: If your Honor please, the element of time is not of singular importance to me in that I am employed on an annual salary, but I had not understood that there was going to be any question that these were not the books and records of the company, but as the Court can appreciate, it is going

to take us a great deal of time beyond our estimate of the time of this case if we have to prove the individual items, and produce the individual bookkeepers, where, as in the case of this witness, he does not remember certain entries or who made certain entries; and therefore can not say he made them directly.

The Court: Well, it does seem to me that there is someone among the defendants who knows whether those are the books and records of the corporation, and kept in the regular course of business, and that it was the course of business, and that they are sufficiently interested to shorten the time of trial. I suppose it would take somewhere between five and ten days to prove all of these, possibly considerably longer, and it would require the bringing in of a number of witnesses. Now, if the defendants and their counsel wish it that way, there is nothing I can do about it." * * *

Mr. Adams: May I, on behalf of the defendant Twombly, offer this stipulation, which I think may save us a lot of time, that where the witness, without any waiver of the objections I have made or the benefit of the ruling —that where the witness testifies that he made a certain entry himself or a certain entry was made under his direction, that we eliminate the two questions and answers: 'Were these records made by you in the regular course of business?' and 'Was it the regular course of business to keep such records?' because that repe-

tition of that is taking time all of the time and I see no necessity for it.

The Court: Well, of course, that is supposed to apply to the entire group, but in order to be safe, counsel has been doing that.

Is that satisfactory to all of the defense counsel to have it so stipulated?

Mr. Irwin: Your Honor, you recall I offered that stipulation yesterday afternoon and Mr. Campbell said he didn't desire to accept it. It is still most satisfactory to me.

The Court: Is it satisfactory to you, Mr. Lawson?

Mr. Lawson: Yes, your Honor.

The Court: You, Mr. Butler?

Mr. Butler: Yes, it is, your Honor.

The Court: Very well. That stipulation will be received.

(F) The foregoing occurred during the examination of plaintiff's witness, C. Ernest Perkins:

"Q. I show you plaintiff's Exhibit 29, the general ledger of the First Security Deposit Corporation; and I will ask you to examine this book and state whether or not the entries made herein from the setting up of this ledger until the termination of your employment in December of 1934 were made by you or under your direction.

A. Yes. I would say that the original records from '33 possibly up to the last of March were made by me.

Mr. Campbell: Might the stipulation heretofore entered into be considered as applying at this point to this exhibit?

The Court: It may be so considered.

Mr. Campbell:

Q. I show you——

Mr. Irwin: Might I interrupt, if your Honor, please. Was that the last entry in that particular book, the entry at the end of March?

Mr. Campbell: It is not, your Honor. We will produce additional witnesses."

'The witness was shown plaintiff's Exhibit 30 for identification, the general ledger of the Realty Department of the First Security Deposit Company, and testified that he did not *hand* that book.

The witness further testified that plaintiff's Exhibit 31 for identification, a stock ledger, was kept by him, but that he did not know who set it up. That his best recollection is that it was set up some time in 1933.'

"Mr. Campbell: Might it be deemed that the stipulation applies at this point as to that volume?

The Court: It may be so considered."

(G) During the course of the examination of plaintiff's witness, Perkins, the following occurred:

"The witness further testified: That plaintiff's Exhibit 141 for identification, a letter dated February 27, 1934, is a letter which he sent or caused to be sent to the holders of col-

lateral trust certificate due May 1, 1934; that it was mailed or caused to be mailed on or about February 27, 1934. That the circumstances under which he sent and mailed that letter were the same as the previous letter.

'Mr. Campbell: May this be marked Exhibit 141 for identification?

The Court: It may be so marked.

Mr. Irwin: So I will be correct, counsel, are we jumping by 140?

Mr. Campbell: Yes.

The Court: Now, I think that we waste a lot of time by these questions as to numbers. I am not going to require the plaintiff to put these documents in according to any particular order, and counsel will simply have to take the number and check afterwards, instead of wasting the time of the court during these short sessions. These documents can be available from early morning until late at night, and counsel can check them afterwards, rather than waste our time during the session.' ''

(H) At the conclusion of plaintiff's opening statement, the following proceedings were had:

"The Court: Now, gentlemen, it is quite apparent to the Court and the jury that there are a number of different corporations involved here. It may be a little easier for the Court, because of his particular training, to follow these transactions which I think, by the ques-

tions, I was able to do. I am not so sure that it was possibly quite as easy for all of the members of the jury. Some undoubtedly followed it just as well as did I, and possibly much faster.

I want to ask counsel for the plaintiff, and for the Defendants, and ask the jury, if it wouldn't be of great assistance to all of us to have counsel, that is, counsel for the plaintiff with the approval of counsel for the defendants, get up a chart and put these corporations' names down on that chart in large type and put it on easel so that we will have it up here all the time.

First, Railway Mutual Building and Loan Association. Now you can, if you wish, put the capital structure of that off to one side, at least put the date of its organization and possibly a separate sheet showing its capital structure.

Then, second, the First Security Mortgage Corporation, then the First Security Deposit Corporation, then the Realty Deposit, then R.F.D. Discount, then Consolidated Investors, then Investment Finance Company, and then the American Bank, American Building and Investment Company, the Bond 17 Dog Food Company, and so on, so we will have here all the time these names and we will be able to fit those particular corporations into the picture.

Now, wouldn't that be helpful to you gentlemen?

(Jury assents.)

Will you gentlemen prepare such a chart?

Mr. Campbell: Yes. I will be glad to.

The Court: With the assistance of counsel for the defendants.

Mr. Lawson: Yes.

If your Honor should consider that a number of those companies are pertinent to this case, I think it will be a very helpful suggestion, but I would like to be heard in argument as to the limitations that counsel for the Government here has gone into on the case which he proposed to submit.

I would like to present to your Honor the proposition that there are only three companies involved, that is, the First Security, the Investment Finance and the Railway Mutual.

Our position in regard to a great many of these matters that he has gone into, Mr. Campbell, are not relevant to the case and will only lead to confusion.

The Court: Well, it isn't going to do any harm because certainly if I rule that the affairs connected with any one of these corporations on this chart are to be ignored by the jury, they are going to ignore it, and that is that, and yet I think the continuity is there and that it would be very helpful to all parties to have them there.

We may not use all of them, but we may use some, and in any event, we will have the picture, and rather than being a detriment to the

defendants, I would think it would be helpful to clear the whole situation up." * * *

"Mr. Adams: I don't think we ought to put upon any chart the name of an individual or company in which any particular investment was made. In other words, I think the jury might be aided by showing the diversification from the Railway Mutual to the First Security and then from the First Security to the Investors Finance."

* * * * * * *

"The Court: But on this chart we have the original company, Railway Mutual Building and Loan Association, then the First Security Mortgage Corporation, which was its successor, or which took over certain assets. Then the name of that was changed to First Security Deposit Corporation. One of the subsidiaries of that, as I understand the remarks of counsel, is the Realty Deposit Company.

Mr. Lawson: Your Honor, that was a bookkeeping arrangement on the books.

The Court: Regardless of that, the name will undoubtedly appear, and we will want to know where it fits in.

Then the R.F.D. Discount Company, an affiliated organization.

Now, then, Investment Finance Company clearly appears in the chain of circumstances. I don't know to what extent Consolidated Investors was discussed by the Government in the opening statement.

Mr. Campbell: It is simply the successor or name change of the R.F.D.

The Court: That is what I thought. That can be shown.

Now, then, the State Investors Corporation, I am not just sure as to that.

Mr. Adams: That, your Honor, is the place where I suggest your Honor stop. When we get to Investment Finance Company, that is the Company that Mr. Campbell has alleged for the Government loaned, or made unlawful loans to this, that and the other company.

The Court: I understand the State Investors Corporation, American Building and Investment Company, American National Bank of Santa Monica, Bond 17 Dog Food Company, Pacific Brick Company, and Pierce Petroleum Company, were companies entirely outside of the capital structure purview of these corporations.

Mr. Adams: Yes, sir.

The Court: They were corporations in which money was alleged to have been invested from time to time.

Mr. Adams: Yes.

The Court: All right. We will have no confusion then. Let's confine our first chart to these seven. We have the names, the dates of organization, and the capital structure."

(I) During the course of examination of plaintiff's witness, Clarence M. Bruce, the following occurred:

"Q. Will you state from such examination what the by-laws provided as to the number of directors of such corporation?

Mr. Lawson: Objection that is not the best evidence.

* * * * * * *

The Court: I don't feel that the jury should be required to sit here from now until whatever time it takes to bring out each minute book, each article of incorporation, to examine each by-law, examine all the minutes, to fish out for themselves here in open court, for the gratification of anyone, all of this detailed information, when it is available in summarized form; and if incorrect is subject to correction where the books are available. There is nothing mysterious about it at all. It is a case of he who runs may read. Why should we take ten days to accomplish a thing that can be done in a couple of hours?

Mr. Lawson: May I make my position clearer with reference to that, your Honor? The use of a summary by an accountant is well recognized for financial matters, the figures, the bookkeeping; I understand that. I am objecting against this witness, who is qualified as an accountant, to testify as to what the minute books, the by-laws, or any other written matter that has been introduced here, as to what those records may contain.

* * * * * * *

The Court: The objection will be overruled. You may answer that question.

Mr. Lawson: Exception.

The Witness: Seven, up to a certain date.

Q. Was that number subsequently changed?

A. Yes, sir.

Mr. Lawson: May my same objection run without repetition? With the understanding, the same ruling and an exception allowed.

The Court: Yes. I am only going to allow him, if you insist upon the objection, to ask for the number of directors, provided from his examination, with the understanding that if the information is not correct, for any reason, that counsel will have an opportunity to correct it, either on cross examination or by calling the Court and the jury's attention to the record."

The witness further testified: That the by-laws were amended subsequent to February 16, 1938, so as to provide for five directors of the First Security Deposit Corporation.

"Q. Mr. Bruce, as an accountant, did you also examine the charter and by-laws of the corporation, which have here been placed in evidence, for the purpose of determining what stock should be voting stock? Answer that yes or no.

A. Yes.

Q. And what did your examination disclose?

Mr. Lawson: Same objection your Honor.

The Court: The objection will be sustained.

Mr. Campbell: May I have Government's Exhibit 1, 9 and 18?

Mr. Adams: Your Honor, while counsel is examining that, might I call your attention to the fact that in the schedules the addition is incorrect?

The Court: The schedule has been objected to by Mr. Lawson, so that it is not of any moment to us.

Do I understand, Mr. Lawson, your objection goes to these charts so that the Government need not go to the trouble of preparing those charts? If you object to one, I understand you object to both.

Mr. Lawson: Your Honor, I don't object to what I consider the companies involved here, not the First Security and the Investment Finance Company, and the Railway Mutual.

The Court: Is this company not the First Security?

Mr. Campbell: It is the First Security.

Mr. Lawson: That is the First Security. I have no objection to any pictorial representation as to whatever the facts are with that one correction on the legend.

The Court: But you did object and require the examination of the witness and required the production of all of the original documents to prove it. Now, what is your position?

Mr. Lawson: My position is that I am anticipating this witness' attempting to summarize the minutes of the meetings of the Board of Directors to show certain facts. Now, so far as the number of directors, the capital struc-

ture, the stock issued, I haven't any particular objection to that. I am simply preserving my rights with reference to what I have anticipated will come.

The Court: What I am trying to do here, and when I suggested the preparation of these schedules, was to save time. That doesn't seem to have been effective because you have objected to the schedules produced to permit a stipulation with regard to them, and now you have objected to the testimony of the witness who prepared the schedules, and have insisted upon going back to the original documents.

Now, I want to know: What is your position. You either object or you don't object.

Mr. Lawson: I have tried, your Honor, to make my position clear in that I am not trying to be obstreperous or trying to consume time. I am simply as I stated to your Honor, anticipating what this witness is going to testify as to what may be contained in the minutes.

The Court: When the schedule was attempted to be introduced, you (referring to Mr. Lawson) objected to it on the ground that it was a summary, although nothing was said at the conference before the bench, nor was any objection made by you, so far as I know, at the time it was proposed. Now, if your position is that you object to it, I want to know it, because then it can't be used. It can only be used, as I explained in the first place, by

agreement of all counsel in order to save time. If you object to this witness' testifying as to what he has gleaned from these books, your objection then will have to be sustained and we will have to have each one of these entries read to the jury. We will have to go back and read the articles of incorporation, that portion of it dealing with the capital structure; have to read that portion of the by-laws dealing with the number of directors; we will have to read each minute of each corporation showing when there was an election and when there was a change."

(J) During the course of the examination of plaintiff's witness, Bruce, the following occurred:

"Q. Will you point out to me, Mr. Bruce, where that is contained?

A. (Examining book). (Pause)

The Court: I think possibly I ought to make it clear that no past objections will be given any validity now at our change of plan or program. I only permitted the objection to hang over because I thought we were trying to save time. From now on the objections must be made specifically and exception save at each point as to each defendant.

Mr. Irwin: * * * There are certain meetings, some of my defendants were not there, and some of them were. As to those that were there there is no objection * * * But it will be necessary for me to follow counsel, or to ask counsel in

reading to state if any directors were absent, and then interpose the objection of hearsay.

The Court: Yes, you will have to make a technical objection if we are going to have to go back to all of the original documents and take the time to go into those. You are not able to stipulate as to who are officers and directors of this corporation from time to time, the stock that was outstanding, and so forth, and we have to go back to the original; so there will be no other way to it, than for you to make objection.

Now, as I understand it, you were willing to so stipulate, but there is nothing that I can do about it so long as counsel for one of the defendants make objection. The objection is sustained, and we will have to go to the original records and all defendants will have to be governed then accordingly.

Mr. Irwin: Very well, your Honor."

(K) "The Court: Now, the matters before the Court are the minutes of the stockholders' meeting of the Pierce Petroleum Corporation under date of February 19, 1937. That was just one, was it?

Mr. Campbell: Yes.

The Court: Exhibit 84. And the letter dated January 3, 1936 passing between Pierce Petroleum Corporation and Investment Finance Company. The Court rules that both of these documents are admissible to show intent.

You may now ask for a stipulation as to signature.

Mr. Adams: We wish an exception to the ruling.

The Court: You may have the exception.

You may ask for Mr. Adams' stipulation as to the signatures.

Mr. Campbell: At this time I will ask if it may be stipulated.

Mr. Lawson: For the purpose of the record may we have an exception?

The Court: Yes, it hasn't gone in. I will take care of that when the time comes. Give them numbers for identification now.

The Clerk: The letter will be plaintiff's Exhibit 180 and the minutes 181.

Mr. Campbell: Might it be stipulated that—

Mr. Adams: May I ask a question first? Your Honor, in admitting these minutes, your Honor is admitting them over the objection of no foundation?

The Court: No. It was my understanding that these documents which were being shown, signed by any of the defendants, that they were to be admitted on the stipulation of the signature, and I have been following that policy.

You said that you would now, if you ever entered into such a stipulation, withdraw from it and would insist upon the Court's first passing upon its materiality, and then you wanted it handed to you, and rather than require a

handwriting expert to prove Twombly's signature, then you would then determine what you would do about it.

Now, I haven't admitted this in evidence. I have simply ruled it is material on the question of intent. I have asked counsel to submit it to you, and ask you whether you are willing to stipulate.

Mr. Adams: I don't understand you frankly. I am at a loss. I said to your Honor that if your Honor admitted it in evidence—now, your Honor just said you are not. I don't know whether it is admitted, or whether it isn't. If it is admitted then it must be admitted for some purpose. What I am trying to point out, if your Honor overrules my objection of no foundation, if your Honor then overrules my objection of hearsay, if your Honor overrules my objection of not being material, if your Honor then admits it in evidence, then I will be glad to stipulate to the signature, but I want your Honor's ruling on the matter of foundation and other points.

The Court: You are asking the impossible. How can I admit a thing in evidence when there is no foundation laid so far as the signature is concerned?

What you just stated you had said wasn't what you said at all. You said if I would rule it was material, rather than put the plaintiff to the trouble and expense of bringing in handwriting experts, that you would then determine

whether you are going to yield and say that the signature of Mr. Twombly was genuine.

Mr. Adams: I felt, your Honor, this way, as your Honor well said to me the other day, foundation for a document may be laid in many ways.

The Court: That is right.

Mr. Adams: Foundation for this document is being laid in no way except through the signature of Mr. Twombly.

The Court: That is it, exactly. I have already ruled that no other foundation was laid and that other foundation will have to be laid insofar as the Defendant Twombly is concerned unless you are willing to stipulate that those are the genuine signatures of your client.

It cannot be admitted because no foundation has, as yet, been laid as against your client.

Mr. Adams: I won't stipulate to anything at the present moment then under the ruling, and I take an exception to the ruling.

Mr. Campbell: If your Honor please, may I withdraw these two exhibits from the identification numbers?

The Court: Yes. Just leave the identification numbers on them.

Mr. Campbell: May I withdraw or take with me the two exhibits?

The Court: You may take them out of court.

Mr. Campbell: Now, I wish to read from the minutes of the Investment Finance Com-

pany. Might I state, your Honor, that the statement I made just prior to the noon recess that the evidence now being offered is being offered as to all defendants with the exception of the Defendants Twombly and Cronk still apply?

The Court: Before we go into that, I think I want to explain my ruling. Maybe I haven't made it clear.

These minutes and a letter to which I alluded were offered in evidence. There was no foundation laid for their admission by having anyone take the stand and show that they were the records of the corporation kept in the regular course of the business and that it was the habit of the company to keep records of that type.

In the absence of that foundation the documents were, regardless of how I felt about their materiality if admitted, they were not admissible unless they could be admitted under the stipulation which we have heretofore had, * * * counsel making the point that no proper foundation was laid, and refusing to take any position as to signatures, they cannot at this time be admitted without a further foundation as to the defendant Twombly.

As to the defendants represented by the two attorneys, they may be admitted under the stipulation."

XXVIII

Said District Court erred and was guilty of con-

duct highly prejudicial to the defendant Edgerton before the jury in the following particulars:

(A) During the course of the examination of plaintiff's witness Florence Anderson, the following occurred:

"Q. But you can definitely state that those whose names I have given you with the addition of Brayton, were directors as of that date?

A. I can.

Mr. Irwin: Pardon me, your Honor. I hate to interrupt but I think that is misleading, that last question, that those he has named with the addition of Brayton were directors. We know that there were at least seven or nine and he has a list in front of him. I think we are entitled to have the entire board.

The Court: Now, I am not going to have to call this to your attention again. The plaintiff is entitled to put in its case * * * You may bring out those matters on cross-examination and I shall not tolerate any more interruptions of that sort."

(B) During the course of the examination of plaintiff's witness, Perkins, the following occurred.

"Asked who handed it to him for his signature, the witness answered: 'I presume it came from the manager's office; that is my best recollection.' (Thereupon plaintiff's Exhibit 139 for identification was received in evidence. Said Exhibit is separately certified pursuant to stipulation and order of Court.)

"Mr. Campbell: I will ask to have marked as 139-B the portion of this file. With counsel's permission, may I take the two mimeographed letters away from the clip?

Mr. Lawson: Not only with my permission, but it would be very much in accord with my conception of how these letters should be introduced, that they should be introduced separately.

The Court: Just say "yes" and save a lot time.

Mr. Lawson: Your Honor, I want to call your Honor's attention to what I think is——

The Court: (Interrupting) I don't want any discussion in front of the jury. You consent. That is all that is necessary.

Mr. Lawson: I consent, provided he goes all the way.

The Court: I want the jury to get their evidence from the witnesses and not from the lawyers."

(C) During the course of the examination of plaintiff's witness, Bruce, the following occurred:

"Q. Will you state from such examination what the by-laws provided as to the number of directors of such corporation?

Mr. Lawson: Objection that it is not the best evidence.

* * * * * * *

The Court: I don't feel that the jury should be required to sit here from now until whatever time it takes to bring out each minute book,

each article of incorporation, to examine each by-law, examine all the minutes, to fish out for themselves here in open court, for the gratification of anyone, all of this detailed information, when it is available in summarized form; and if incorrect is subject to correction where the books are available. There is nothing mysterious about it at all. It is a case of he who runs may read. Why should we take ten days to accomplish a thing that can be done in a couple of hours."

(D) Upon offer of Plaintiff's Exhibit 46 in evidence the following occurred:

"Mr. Lawson: Your Honor, the matter really hasn't received a great deal of attention, and I think it is a very important part. Your Honor has read the comments, and you are familiar with them. I merely submit this is a test: That if the witness were on the stand himself, he wouldn't be permitted, under objection, to testify, because he would be stating opinions and conclusions. I think that is sound, your Honor.

The Court: I disagree with you on that. I shall when the time comes instruct the jury that this is not being admitted to prove the truth of the statements contained in it, but simply to show that that information was communicated to the defendants. You mean to tell me that if that auditor told these defendants that he permitted to say that he told them in person?

Mr. Lawson: Under the circumstances of

this case I would take that position, your Honor.

The Court: Then that is a matter that will have to go to the Circuit because I disagree with you on it. I will admit it on that point. It is not being admitted to show the truth or falsity of what is contained in that auditor's report, but to show that that audit report was delivered to these directors.

Mr. Lawson: I would like to have included in the objection, which I have already made, the specific objection of hearsay. And futher, that it has not been connected up in this manner; that the mere fact that it was on file with the corporate records is no proof of the direct knowledge of the defendants Ireland and Edgerton."

(E) During the course of the examination of plaintiff's witness Grace Benn, the following occurred:

The witness testified "I think the gentleman I talked to that time was Mr. Ireland. At that time I discussed the purchase of my securities."

"The Court: Will you in the brown suit stand up?

(The gentleman arose as requested.)

The Court: Is that Mr. Ireland?

The Witness: I don't think so.

The Court: Will you stand up?

(The gentleman referred to arose, as requested.)

The Court: Is that Mr. Ireland?

The Witness: No.

The Court: Will you stand up?

(The gentleman referred to arose, as requested.)

The Court: Is that Mr. Ireland?

The Witness: I don't think so. I just saw him the one time.

Mr. Lawson: May the record show that is Mr. Ireland.

The Court: You are Mr. Ireland, are you not?

The Defendant Ireland: Yes, your Honor.

The Court: Stand up again. Is that the man you talked to, if you know?

(The defendant Ireland arose, as requested.)

The Witness: No, I don't think so."

(F) During the course of the examination of plaintiff's witness, Audra D. Jones, the following occurred:

"Q. Do you recognize the gentleman in the court room with whom you had conversation on that occasion?

"A. I don't think I would.

Q. Well, will you look about the court room and see if you see him here?"

Thereupon the court directed each defendant successively to stand and inquired of the witness if such defendant was the person with whom she had

the conversation and the witness in each instance replied "No" or "I don't think so."

(G) Plaintiff by reference incorporates paragraphs (A) (B) (G) (I) (J) (K) of the Assignment of Errors No. 27 as a part of this Assignment of Error constituting conduct of the Court in the presence of the jury highly prejudicial for the defendant Edgerton.

(H) Following the introduction in evidence of Defendant's Exhibit 39 reciting details concerning financial transactions of the Investment Finance Company with Pierce Petroleum Corporation and Charles E. and Maryan A. Kenner and subsequent to the admission in evidence of Plaintiff's Exhibit 46, the court made the following statement:

> "The Court: Now, Gentlemen of the jury, you must not connect in your minds this use of the name Kenner with the Kenner name which was in the statement made by Mr. Twombly. There is no proof here of the truth of the statement made by Mr. Twombly, and it wasn't put in, as I explained to you, for any other purpose than to show the condition of Mr. Twombly's mind from which might be indicated an intent so far as he is concerned."

XXIX

Said District Court erred in overruling the objections and exceptions of the defendants and each of them, respectively, to Plaintiff's Exhibit 216 and admitting the same in evidence, in denying the motion of the defendant Edgerton at the conclusion

of the plaintiff's case and renewed at the conclusion of all of the evidence in the case to strike said exhibit. The plaintiff's witness Webster testified that on July 9, 1940 Plaintiff's Exhibit 216 came into his possession from the inspector in charge at San Francisco, California; that he had a conversation with the defendant Twombly with respect to Plaintiff's Exhibit 216 on July 9, 1940; that the defendant Twombly stated that he had prepared Plaintiff's Exhibit 216 from memory and handed the same to Inspector Van Meter and that the information contained in said exhibit came to his attention while he was associated with the First Security Deposit Corporation and the Investment Finance Company. Prior to the receipt of said Plaintiff's Exhibit 216 in evidence, the following proceedings were had in the absence of the jury:

> "Mr. Campbell: * * * Now, this document is offered, you might say, upon two bases; First, as admission against interest on the part of the Defendant Twombly, and, second, to show his joining that scheme, or enterprise, and as to him the existence of a scheme or enterprise."
>
> * * * * * * *
>
> "The Court: Now, I think it is only fair, in order that you may present the matter intelligently to the Court, to say that it involves, for the purpose of illustration (I have gone through it very hurriedly) all of the defendants and describes at some length, six pages, single spaced, the activities of this corporation. So that for the purpose of argument, you may

consider that all of the defendants are involved."

"The Court: It is perfectly clear that such a document as this couldn't be considered to be properly introduced in evidence as against the other defendants, having been made subsequent to the termination of any possible connection which he had with the conspiracy, * * *"

"* * * it is conceded by the Government that Twombly severed his connection with both of these corporations about the 21st of December, 1938. Now, on July 9th, 1940, a year and a half after that, he made the statement to the postal inspector as to facts."

"Mr. Lawson: * * * when I thought or heard the rumor that there might be hostile defenses, I had Mr. Adams bring Mr. Twombly to my office. * * *

"and I canvassed this situation with him very carefully to find out—I am not saying that there are any hostile defenses—but to find out as to whether or not there were any hostile defenses.

We spent about three or three and a half hours in canvassing the case, and in all of its phases, and I was assured from the beginning until the end that no statement had ever been made by Mr. Twombly, either in the form of a written statement, or any oral statement, that he had made any damaging or incriminating statements pertinent to my client, or any of the other defendants in the case. And I want

to assure your Honor that I went into that very thoroughly, and carefully.

I have no reason to believe that that statement contains anything contrary to the statements that were made to me at that time, and I can assure your Honor that up until the time that this statement was presented I have always been of that mind."

"* * * if, assuming now that it does contain something contrary, as represented to me—it is a complete surprise. We have been collaborating all through the defense on the assumption that no statement has been made of a damaging character to my clients.

* * * * * * *

Mr. Irwin: Why did we make all this inquiry at the outset?

Well, it is no secret that there was a very severe disagreement between Mr. Twombly and the others, and the break was not a pleasant one. It happened in '38, and prior to the time of this indictment they weren't even on speaking terms, so as lawyers, being advised of that, we were interested in finding out what had gone before, and that is why we started looking for those statements that might be made by a person in the heat of passion or who doesn't reason."

"The Court: * * * If they want to know what it is right now, we will have to read it out loud * * *."

(Thereupon said Plaintiff's Exhibit 216 was read into the record in the absence of the jury.)

"Mr. Campbell: If your Honor please, my position in this matter is * * * the narration of these events by Mr. Twombly constitutes admissions on his part, first, as to his knowledge of those events at the time they occurred, * * *, secondly, that he had knowledge of the existence of a scheme to defraud, * * * and that he knowingly joined in that scheme * * *

Mr. Lawson: What I would like to know, your Honor, the question of knowledge wherein does that document show that Twombly had that knowledge during the existence of the conspiracy. I don't see it."

* * * * * * *

"Mr. Irwin: In the event your Honor rules that this statement may be received as to the defendant Twombly only I believe that a motion for a severance should be made on the following grounds:

The Court: You make this motion now applicable to the time it is admitted?

Mr. Irwin: * * * I respectfully move * * * for a severance from this trial on the following grounds: That the evidence contained in Plaintiff's Exhibit 216, though it is competent or might be competent as against the defendant Twombly, is incompetent, hearsay, and prejudicial to the rights of the (other) defendants * * * and that its admission deprives the defendants of a fair and impartial trial to such

an extent that no admonition to the jury would remove the prejudice created by the reception of that exhibit * * * in evidence. * * * When I was retained in the case, I was advised and told by my clients that they didn't trust Mr. Twombly, that they didn't want to cooperate with him in connection with the trial because there had been considerable friction and considerable hard feelings, and that he had been discharged from the company under very unhappy circumstances, they didn't wish to collaborate or to cooperate, and to watch him. That, in effect, was the admonition.

As we got into the investigation of this case, word was sent to Mr. Edgerton by mutual friends of Mr. Twombly, that his attorneys should certainly cooperate with him and that there was no hard feelings, what is gone is gone, and everybody was in the same boat, and that he wanted to get together. * * *"

"* * * We understood that Twombly had been assisting the post office inspectors in the investigation of the case. * * * We understood that there was prejudice and hard feeling— * * * but what we wanted to know before we considered any collaboration and likewise whether or not we should consider a motion for severance which had to be supported by affidavits—was whether or not Mr. Twombly had made any written statement of any kind to the post office inspectors * * * which would implicate or in-

volve or cast discredit and which might be admissible in evidence in this lawsuit.

* * * Mr. Adams told me, not once but on several occasions, that he had interrogated Mr. Twombly * * * and that Mr. Twombly had assured him that there wasn't any, and that he, Mr. Adams, * * * was satisfied that Twombly, in fact, had made no statement. Twombly told me he had made no statement as late as yesterday afternoon * * * He said 'You won't find a thing damaging to your clients in that statement.' * * * If we had made a motion for a severance before the trial started, after the inquiry and the research we made, we would have had no grounds. We couldn't have made any affidavit * * * There was an antagonistic defense * * * there was nothing which would have justified a motion for severance before this jury was impanelled, we could have made no showing to the court."

* * * * * * *

"I believe it is very persuasive that this statement of itself indicates that the defenses, and that are now for the first time known to us, is clearly hostile and clearly antagonistic.

"Now, as to the prejudicial nature, may it please the Court, even though it is restricted as to the Defendant Twombly, I will ask your Honor's consideration of this fact: Would your Honor say that in our duty to our clients, that even though your Honor restricts this statement to the Defendant Twombly, that we could

go on and present the defense in this case, which would ignore, before the jury, the accusations and charges made by the defendant Twombly?

The question suggests its own answer.

For example, your Honor, we would have the burden of showing that in the fore part of that statement, Mr. Twombly leaves out that Mr. Edgerton had nothing to do with it; that Haight and Trippet were the attorneys who organized that, and that H. F. Dunton, the man who outlined the plan, had just recently resigned as Deputy Building and Loan Commissioner.

We would have the burden of showing that Mr. Twombly initiated the Pierce Petroleum loans and initiated the dog food plan.

I say to your Honor, as opposed to the question of the prejudicial nature, I think it suggests its own answer. * * * This matter before us, * * * isn't an admission; that is a complaint that this man initiated it. * * * Now it appears for the first time that that is why we are here. * * * What it amounts to, * * * is a second indictment we have to meet. It includes charges, * * * that are not contained in this indictment."

"Mr. Lawson: Your Honor, might it be considered that the same motion that was stated by Mr. Irwin, that it may be made on and in behalf of the Defendants Edgerton and Ireland and on the grounds therein stated, that prejudice will result in the trial of Edgerton

and Ireland, and of such character that no instruction or limitation by the Court as to proof will cure the prejudice; and as a result they will not have a fair and impartial trial.

The Court: It may be stipulated that the same motion may be deemed to be made as to those defendants.

Mr. Campbell: So stipulated.

* * * * * * *

Mr. Lawson: The vice in this situation is this: That the statement, as made by Mr. Twombly, is, in the form of an accusation, or a complaint against the defendants, and particularly as to the defendant Edgerton. Ninety per cent of that statement is a *strieture* against Edgerton in so many words; in so many words it says that he is guilty of this, that, and the other thing, stating a long series of conclusions, not a statement of fact.

Presuming for the moment that up until the time of the trial that everything was done properly; that is, a proper course of conduct was taken by counsel in regard to the protecting of the right of the client, which I am satisfied was, and I might say, incidentally, there, that I am familiar with the rule that ordinarily a motion for severance is not granted. * * * I wouldn't make that motion unless * * * I had * * * strong reasons to support my application, otherwise, we would be merely making a frivolous motion."

"Here is the situation that we find ourselves in: As I stated to Your Honor yesterday, that having heard statements of a character that Twombly may have said something derogatory about the Defendant Edgerton, I believe I discussed this with Mr. Campbell and Mr. Campbell said in a jocular vein, said, 'Well, what we have on Twombly,' and so forth. I think that is a correct statement. I think in the same vein I asked him what it was, and he said, 'You will hear about that later.' "

* * * * * * *

"Mr. Lawson: I went into the matter first with Mr. Adams and discussed it with him, and then I suggested that Mr. Twombly come to my office, and Mr. Adams and Mr. Twombly came to my office * * I took my gloves right off and put it in a very blunt form of question, and told him exactly what I had been informed, and that I wanted to know * * * if he had made (a) statement. * * * Now, Mr. Twombly, * * * I learned * * * during our discussion that evening, is not only a lawyer, but he is an accountant. * * * He not only kept the books, but he made the audits. * * * Now, when we discussed it that evening, * * * after I was assured that * * * no damaging statement had been made, and that he would fully cooperate, I said, 'You are just the man to take care of that period, because of your particular knowledge and skill, and on all questions relating to that period we are going to look to you to take care of.' That was the

understanding we had, and I relied upon it all through the preparation of the case and during the trial of the case.

* * * * * * *

The Court: Now, let me ask you just one question: Suppose that Mr. Twombly had said to you yesterday 'Gentlemen, whether you like it or not, I have made up my mind that I am going on the stand, and I am going to answer every question that anybody asks me about this matter;' would you be in any different position?

* * * * * * *

Mr. Irwin: * * * The defendant can take the stand and have the opportunity of cross-examination. It comes for the first time, and he puts in his direct testimony, and it must be evidence and not conclusions. You have an opportunity to object to every question as he goes along, and he is confined to legal competent evidence. Now, this statement contained all kinds of conclusions.

* * * If he took the stand he would not be able to state that Starr, Smale and Thomas violated their trust, the trust of those depositors, because that is hearsay, clearly as to him. There is nothing in the books. Plaintiff's counsel hasn't shown a thing that Starr, Smale and Thomas violated their duties, that they had been running around indiscriminately getting the security holders signed up.

All that stuff that he refers to in '31, '32, and '33, the most damaging kind of things, Your Honor, which are the rankest hearsay on his part, because he doesn't come in until '34.

I think those are two points upon which Your Honor's hypothesis may be distinguished.

Again, in that connection, his manner on the stand, the usual instruction that the jury has, our cross examination proving the falsity of his statements, providing we can, would be checked and counter checked by a restriction, so that we got only competent evidence; and that the full story would be there at one time instead of going in this way that the burden is upon the defendants of taking something, which is not admitted as against them, and cannot be received as against them, and refuting the whole thing in addition to what is in the indictment."

"The Court: * * * I have made up my mind that my ruling will be that there will be no severance * * * I shall be willing to receive and permit them to file * * * any affidavits that they may want * * *.

Mr. Irwin: * * * Might I ask your Honor whether this wouldn't eliminate unduly encumbering the record * * * if Mr. Lawson and I were permitted to be sworn * * * and then state that the statement given * * * is true in all respects, to the best of our knowledge, * * *. Therefore that that would be in effect our tes-

timony without encumbering this record with affidavits?

The Court: I am perfectly willing to have you, in lieu of affidavits."

Thereupon, J. J. Irwin and Gordon Lawson having been first duly sworn were examined and testified as follows:

"The Court: Was the statement that you made this morning true as to the facts which you gave in connection with the motion for severance, Mr. Irwin?

Mr. Irwin: It was, your Honor; in substance, each and every one of the facts related are my recollection.

The Court: So far as you know at the present time, there are no corrections or errors in that statement of facts?

Mr. Irwin: That is correct.

The Court: In so far as the statements purported to indicate any knowledge on your part or any contact on your part, was it true?

Mr. Lawson: True, your Honor.

The Court: You have no correction to make?

Mr. Lawson: No corrections."

"Mr. Irwin: So it may be preserved, may it be stipulated that the motion has been made and that it is denied and exception is granted?

The Court: Yes.

Mr. Irwin: There is this other motion to-wit, the motion is now made, may it please the Court, on behalf of the defendants Starr,

Smale and Thomas, individually, for themselves, that this Honorable Court withdraw a juror and thereupon declare a mistrial because of the introduction and the receipt of Exhibit 216? That is to complete the transaction.

The Court: The same motion as to your client?

Mr. Lawson: Yes, on behalf of the defendants Edgerton and Ireland.

The Court: The motion will be denied, exception.

Mr. Irwin: May it be considered, your Honor, that these motions were made in a proper sequence following the receipt of 216, and I think this point should be raised, your Honor.

The Court: Just a minute. May it be so stipulated that the motions may be deemed to be made in their proper sequence?

Mr. Campbell: So stipulated.

Mr. Irwin: Your Honor, in this connection, with reference to 216, there has never been any formal objection stated on behalf of the defendants; in other words, your Honor was good enough to consider a motion for severance on the assumption that it was in evidence, so whenever your Honor thinks it is appropriate, and while the jury isn't present, I think the objection should be made.

The Court: Make it right now because I am going to bring the jury down.

* * * * * * *

Mr. Irwin: Your Honor, objection is made to the reception of Exhibit 216 for identification, specifically and individually, on behalf of the defendants Starr, Thomas and Smale on the grounds that although the offer is limited to the defendant Twombly and the evidentiary matter contained in that Exhibit is incompetent as against the defendants Starr, Smale and Thomas, and cannot be received against them, that nevertheless its being received only towards Twombly, that the nature of the Exhibit is so prejudicial to the rights of the several defendants that I have mentioned and it deprives them of a fair and impartial trial to such an extent that no admonition to the jury can or would remove the prejudice created by the reception of that document.

I think I have covered the grounds. Thank you, your Honor.

Mr. Lawson: I want to join in that objection, your Honor, and add to it, on behalf of the defendants Ireland and Edgerton, that there is no evidence in the case that connects up either of the defendants Edgerton or Ireland with the scheme or conspiracy, as alleged in the indictment, and that this is an attempt by indirection to make a connection between those defendants with the scheme and conspiracy as alleged.

* * * * * * * *

Mr. Irwin: Your Honor, I think I should add that the statement in addition is prejudicial because it contains matters which are not

contained in the issues of the indictment, and that it includes matters which are clearly only hearsay as to the defendant Twombly and could not be binding on the defendant I represent.

Mr. Lawson: I wish to adopt that and add to it that it touches on matters that have already been limited to a point, that this statement goes beyond that limitation. As a matter of fact, that it admits evidence that the Court has already ruled to be objectionable.

The Court: The objection will be overruled.

The rule of the Court is that that limitation does not apply to the offer, as limited, or are the objections sound under the offer as limited, to not only the defendant Twombly but as to the intent of the defendant Twombly." (To which ruling of the court, an exception was duly taken.)

(Thereupon said statement was received in evidence and marked plaintiff's Exhibit 216.)

"The Court: Gentlemen of the jury, we have here admitted in evidence a document which will now be read to you by counsel for the plaintiff, the document having been admitted for a very limited purpose. * * *

Now I might think that John Doe and Richard Roe and Bill Smith and Mary Grab were the dirtiest bunch of crooks in the world, and I might take an action predicated upon that feeling. It might not be true at all. And what I thought about these people might be no evidence

at all as to what they actually were, or as to what I thought had occurred.

We describe this as a narration, as a narrative of what has happened in the past. Now that document isn't evidence which you may properly consider in any way, shape, or manner, as against any defendant in this court room, including the Defendant Twombly, except to show his intent in connection with the crimes charged. It is expressly limited to that.

To illustrate: Whether or not those things were true or false would be immaterial so long as the Defendant Twombly thought they were true. If, thinking they were true, he did certain things, then they are admissible to show his intent under certain circumstances."

Thereupon said Exhibit 216 was read to the jury. Said Exhibit is in words and figures following:

"(In ink) Prepared by Mr. Twombly.

'The first Security Deposit Corporation was organized in 1931 for the purpose of reorganizing the Railway Mutual Building and Loan Association. The latter company was rendered non-operative because of the building and loan situation existing at that time, together with the check on operations because of the more stringent building and loan laws as compared with the regulation of general corporations.

To effect the transfer of securities and assets of the Railway Mutual Building and Loan Association it was necessary to procure the

consents of its securities holders. For this purpose an extremely complicated Plan and Agreement was adopted whereby the said holders were to deposit their securities and receive in exchange therefor interim certificates. R. W. Starr, E. C. Thomas and L. S. Edwards were appointed as trustees and managers under the said plan. High pressure salesmen were then sent out to contact the securities holders for the purpose of procuring their consents to the proposed plan of reorganization. These holders were apparently promised and told anything and everything in order to obtain their consents. Those who consented easily got either what they were supposed to be entitled to in securities of the new company, or less. Those who were not so easily sold on the idea in many instances were given preferential securities. No plan of exchange of securities was consistently followed. The so-called Plan and Agreement was so long and so complicated that it was apparently understood by nobody, however, there is no doubt but that the trustees were extremely derelict in their duties.

After the expenditure of approximately $60,000 of those investors' money, it was then determined that there was no law which would permit of the reorganization. Lobbyists were then put to work to procure the passing of enabling legislation by the Legislature of the State of California. This was ultimately accomplished. Until approximately this time the af-

fairs had been dominated and controlled by R. W. Starr, E. C. Thomas and J. L. Smale, and at this time J. H. Edgerton, an attorney, was added. It was still impossible to complete the reorganization because an insufficient number of consents had been obtained. To put the deal over a deal was made with Charles E. Kenner (a graduate of Sing Sing prison for the misuse of other people's money and now in Folsom penitentiary for the same reason). Kenner was to obtain sufficient additional securities or consents to make the plan operative and was to receive approximately $40,000.00 in good first trust deeds for which he had the option of trading Railway Mutual Building and Loan Securities or securities in the First Security Deposit Corporation face value for face value. At this time these securities were quoted at about 20 cents on the dollar. The transactions and all motions clearly show that any realization or acceptance of fiduciary relationship, between these dominating personages and these they purported to represent, was entirely lacking. Such a condition has continued throughout. Not only this, but the history of this set-up reflects that every strong personality connected with these companies who attempted to work for the interests of the investors was ousted.

The reorganization was finally completed with approximately 20% of the investors staying in the Railway Mutual Building and Loan Association and about 80% high pressured into

the First Security Deposit Corporation. The basis of the financial structure of the First Security Deposit Corporation was three classes of stock, and a great many varieties of collateral trust bonds. The First Security was to take 80% of Railway Mutual Building and Loan Association assets and liabilities and the balance was to remain. The same amount of securities in the Railway Mutual Building and Loan Association were to be turned back to them for cancellation. The Building and Loan Commissioner of the State of California designated the segregation of assets, and the best 20% remained in the Railway.

The First Security Deposit Corporation issued bonds in the sum of approximately $1,300,000, preferred stock (A and B) in the amount of $274,460, and common stock in the amount of $4,488. Of the latter stock Starr, Thomas and Smale controlled about $3,350, and this was the voting stock. In this way control was carried on and $3,350 controlled this $1,600,000 corporation for a period of two years. At this time, inasmuch as no dividends had been paid on the preferred stock, the preferred stock became the sole voting stock. However, this made no difference as at the time of issuance of the securities every investor was requested to execute a signature card. Some refused but the huge majority complied. On the reverse side of this signature card there was printed the following, "Proxy, I hereby appoint R. W.

Starr, J. H. Smale, and E. C. Thomas, or any two of them acting in accord, as my proxy to vote my shares at all meetings at which I am not present or have a subsequent proxy, for a period of seven years unless revoked earlier. No statement or condition, verbal or written, other than herein provided shall be binding on the corporation."

No notice of any stockholder's meeting was ever given other than by publication in The Daily Journal, a Los Angeles legal newspaper, and which is not read by the public at large. Therefore, for all practical purposes, the control of the corporation remained unchanged.

The assets in the segregation were finally transferred effective as of January 1, 1934. The Board of Directors of the First Security Deposit Corporation consisted of R. W. Starr, E. C. Thomas, W. S. Brayton, A. R. Ireland, C. E. Perkins and Wm. Leffert and C. H. Berry. Berry and Perkins have subsequently resigned and Brayton has died. J. H. Edgerton was attorney. J. L. Smale remained in the Railway Mutual Building and Loan Association as president.

About this time a first trust deed held on the Reed Bros. Mortuary for approximately $42,000 was in considerable trouble. Mr. Edgerton formed the R. F. D. Discount Co. (at first a partnership and later a corporation) which was conducted and operated in his office. The interested parties were Edgerton, Starr, Smale,

Thomas, Berry, Leffert, Brayton, Ireland, also Aaron Johnson and Florence Anderson who were with the Railway Mutual Building and Loan Association. The R. F. D. Discount Company purported to act as go between in the settlement of this trust deed. Reed Brothers paid $22,000 in cash into an escrow at the Title Insurance and Trust Company, $17,800 of this sum was paid to the First Security Deposit Corporation in settlement of all liability under the trust deed. Edgerton retained $1,000 as attorney's fee. R. F. D. Discount Company got $3,200 for which each of the ten persons received a $320 interest in the R. F. D. Discount Company. The only item showing on the records of the First Security Deposit Corporation is the receipt of the $17,800. No attorney's fee to Edgerton is shown and not approval therefor was ever given by the First Security Deposit Corporation officially.

Early in 1934, a deal was made with Battell-Dwyer Company (a stock and bond concern). They were to have the exclusive right to buy securities of the First Security Deposit Corporation and were to be paid 5 points above what they paid upon delivery of the securities to the First Security Deposit Corporation. On many occasions it appeared they took more than five points, but nothing was done about it. Any sort of story or procedure was used to jockey the investors in the First Security Deposit Corporation out of their securities. The

original price paid was in the neighborhood of 20 cents on the dollar for the bonds, and much stock was procured free on the representation that it was without value.

Included in the assets of the First Security Deposit Corporation was a house on Stearne Drive, Los Angeles, California, and was carried on its books at approximately $7,500. Edgerton, in 1934, decided to buy the house. The First Security Deposit Corporation had acquired some of its own bonds, so Edgerton bought $7,155.06 face value. These had been bought for $2,206.64. Edgerton had these bonds deposited in an escrow where payment was to be made. In the same escrow, he had the papers transferring ownership of the real property deposited. In the escrow he borrowed approximately $2,300 on the real property from the State Mutual Building and Loan Association. With this money he paid for the bonds and the costs of the escrow. The bonds were then returned out of the escrow to the First Security Deposit Corporation in payment of the property. The balance of $2,021.29 remaining in the escrow was paid over to the First Security Deposit Corporation in payment of the property. The balance of $2,021.29 remaining in the escrow was paid over to the First Security Deposit Corporation in full payment for the bonds, or a cash loss on the bond deal alone of $185.35. Approximately one year later, the

First Security Deposit Corporation took back another piece of property located at 239 21st Place, Santa Monica, California. Edgerton bought this property. He sold the Stearne Drive House for about $4,500.00 cash. From Battelly-Dwyer and other sources, he purchased bonds of the First Security Deposit Corporation of a face value of $11,750. The price paid was between 30 and 40 cents on the dollar. These bonds, together with the cash sum of $110.44 was given by Edgerton to the First Security Deposit Corporation for the property. This resulted in a book loss on the property of $372.72. The actual cash loss to investors of the First Security Deposit Corporation on these two deals is about $7,000.00.

In the summer of 1934, auditors in checking bond purchases by the First Security Deposit Corporation from Battelly-Dwyer Company discovered that on approximately 1,000 shares of First Security Deposit Corporation preferred stock $1.00 per share was added to the price charged for bonds and paid by the First Security Deposit Corporation, and the stock was delivered to Edgerton and Starr for the R. F. D. Discount Company. Battelly-Dwyer Company refunded this money to the First Security Deposit Corporation and rearranged their deal with the R. F. D. Discount Company. R. F. D. Discount Company had now become the medium for acquiring all the stock it could of First Security Deposit Corporation. Practically its en-

tire working capital consisted of the $3,200 hereinbefore described. This stock carried voting control, and all of it would become very valuable if the bond holders could be chased out of the picture cheaply enough.

About this time Kenner decided he could use the Railway Mutual Building and Loan Association in some of his manipulations. He approached Edgerton for the purpose of purchasing about $19,000 face value of securities which the First Security Deposit Corporation owned in the Railway Mutual Building and Loan Association and had much to do with its control. It was arranged that the R. F. D. Discount Company would trade the same par value of First Security Deposit Corporation stock to the First Security for its securities in the Railway. This was done, although all holders of First Security Deposit Corporation stock were being assured by Battelle-Dwyer Company that it was worthless. Kenner then paid $1,000 to R. F. D. Discount Company for an option to purchase the Railway securities. He didn't take up the option and forfeited his money. However, the Railway (with some assistance through the use of First Security money in purchase of securities to get the necessary consents) subsequently became federalized and these securities were redeemable for 100 cents on the dollar. Sometime later P. S. Noon needed money in mining operations. He approached Edgerton and it looked like a very lucrative

deal to him. He and four or five others made a deal (involving bonus, etc.) with Noon to procure the money for him. It appears that they borrowed about $15,000 worth of the Railway Mutual Building and Loan Association securities from the R. F. D. Discount Company and hypothecated their stock in the R. F. D. Discount Company to the R. F. D. Discount Company for the return thereof. Edgerton then hypothecated the Railway Building and Loan Association securities to F. E. Jones borrowing money from him which was loaned to Noon. The mining deal failed to come up to Noon's expectations and he is now endeavoring to pay off. Another ramification will be described later. Noon is apparently 100% honest, being a court reporter of excellent reputation.

In October, 1934, Edgerton had caused the formation of the State Investors Corporation, consisting of his father and one J. L. McSwiggen (a former employee of the First Security Deposit Corporation), State Investors Corporation was entirely devoid of any financial backing, yet in October, 1934, the Board of Directors of the First Security Deposit Corporation agreed to enter into a contract whereby it would sell $187,020.93 book value of designated real property to the State Investors Corporation. The State Investors Corporation took immediate possession of the properties and was entitled to receive all rents. It had no obligation to make any payments, other than for taxes,

for one year. It could pay for any individual piece of property by delivering face value of First Security Deposit Corporation bonds for book value of the property, or could pay in cash at the rate of 40 cents in cash for each $1.00 of book value. This arrangement was so entirely bad and unsatisfactory to the First Security Deposit Corporation that the contract was cancelled by mutual consent after about six months.

Dar Knowled, son-in-law of J. L. Smale, purchased a property from the First Security Deposit Corporation for about $1,000 cash. He immediately borrowed an amount from the State Mutual Building and Loan Association sufficient to return the $1,000 and buy furnishings for the house. It is believed that the property was subsequently sold at a handsome profit. Some such deal was also made with another relative (father or father-in-law) of J. L. Smale.

Through the efforts of Battelle-Dwyer Company and others approximately $700,000 worth (face value) of bonds of the First Security Deposit Corporation were acquired and retired, up to the time Battelle-Dwyer Company became more or less inactive in the field. It was an extremely lucrative deal to them, a great deal of the bonds having been acquired through the trading of other securities therefor.

In 1935, the Investment Finance Company was organized and operated in conjunction and

out of the same office with the First Security Deposit Corporation. Its original capitalization was exceedingly small, the First Security Deposit Corporation being the main holder of stock with the purchase of $1,000. This it still holds. Subsequently all of the R. F. D. Discount Company holdings were sold to the Investment Finance Company and the proceeds distributed and the corporation was dissolved. This included the Railway Mutual Building and Loan Association securities which had been pledged. In order to cover this item these same individuals hypothecated their holdings in the Investment Finance Company (which they had acquired by purchasing stock in the Investment Finance Company, with the money received from the sale of R. F. D. Discount Company assets to the Investment Finance Company.) Stock was put up as follows: Starr 2500 dollars, Mary Starr Brayton (widow of W. S. Brayton) 5000 dollars, Ireland 5000 dollars, Edgerton 1666 dollars, Anderson 1200 dollars, Thomas 1160 dollars. Some of the R. F. D. Discount Company holders did not put their entire receipts into the Investment Finance Company.

The Investment Finance Company has financed its operations by borrowing from the First Security Deposit Corporation. At the present time Investment Finance Company owes First Security Deposit Corporation about $275,000 which it has borrowed on an open account not even giving notes therefor.

The Investment Finance Company has engaged in many activities most of which have resulted in frozen assets. A loss of about $25,000 was had on an oil well deal with Kenner. This deal was consummated by Edgerton. Considerable losses were obtained in the automobile business, one deal being the backing of Kenner. Deals with Kenner have cost about $75,000.

The Investment Finance Company took over the purchase of First Security Deposit Corporation securities. It borrowed money from First Security Deposit Corporation and purchases its securities from its investors. The bonds it purchased below face value are either still held or have been turned over to the First Security Deposit Corporation at full value (including accrued interest). The stock it purchased was kept and held for purposes of control of the First Security Deposit Corporation. Letters were written to First Security Deposit Corporation investors telling them First Security Deposit Corporation was in liquidation, and so forth. One C. L. Cronk was employed for this purpose. This was over the opposition of at least one director who stated he believed the writing of such letters was contrary to the Federal Securities Act, and also was possibly using the mails to defraud. No attention was paid to this except that a committee was appointed to handle the matter and consisted of Starr, Thomas and Cronk. Later Edgerton superseded Thomas. Edgerton finally decided that no let-

ters should be written out of the State of California. The Investment Finance Company through this procedure, and through the R. F. D. Discount Company purchase, has acquired about $100,000 par value of First Security Deposit Corporation preferred stock and about three-fourths of the common stock.

Edgerton became interested in the Western Brick Company and caused the Investment Finance Company to invest about $30,000 therein, besides loans by the American National Bank of Santa Monica. He, Starr and Thomas, acquired some free stock for themselves in the transaction. This company was revamped and the assets were sold to the Pacific Brick Company, thereby freezing out minority stockholders in the Western Brick Company. The company has operated at a loss since acquisition.

Edgerton, with Battelle-Dwyer Company, then presented a deal involving the American National Bank of Santa Monica to the Investment Finance Company. The bank had a capitalization of $100,000 and a purported surplus of about $22,000. Assets listed consisted partially of a building valued at $84,000 and furniture and fixtures valued at $17,000, both actually worth not more than $50,000, giving a real approximate value of $71.00 per share. The Investment Finance Company purchased 100 shares at $150.00 per share and loaned Battelle-Dwyer Company $150.00 per share on 167 additional shares. The balance necessary to

constitute control of the bank was sold to clients of Battelle-Dwyer Company after a voting trust had been formed wherein Edgerton and Dwyer were voting trustees. Battelle-Dwyer Company was unable to pay the loan, going out of business, and the Investment Finance took over the stock. The Investment Finance Company now has about $54,000 invested in stock of the bank, and it does not seem possible that any dividends can be paid for several years. One director of the Investment Finance Company went on the bank board and stayed about two months. He claimed something was wrong somewhere in the set-up, including the management of the bank, and should be thoroughly gone over. Edgerton and Starr decided Starr should go on in the fault finder's place to represent the Investment Finance Company on the bank board. Six months later, after much unnecessary money had been spent by the bank, the management of the bank was changed. About two years later the bank examiners found that the building had been written up from $1.00 to the value shown on the balance sheet and cash dividends paid on the surplus accruing from the write-up. This happened shortly prior to the advent of the Investment Finance Company into the picture. It is now necessary that additional funds be put into the bank to rearrange the capital structure to clear up the capital impairment that exists. Edgerton and Starr are now directors on the bank board.

In connection with the bank, another corporation was formed, the American Building and Investment Company. This operates in conjunction with the bank being used as a spring board. Investment Finance Company has invested about $20,000 in this venture which has not as yet shown any huge profits.

One W. P. Bonds next came along and sold Arnold Eddy (associated with Edgerton in the California Federal Savings and Loan Association) and Edgerton on the dog food business. The Investment Finance Company decided to go for the deal. When building was discussed only one individual wanted to build on a strict contract basis. Instead it was a cost plus job and cost many times the original contemplated price. Approximately $60,000 has been invested in this venture.

None of these ventures has made any profits and the possibilities of ever making any are exceedingly remote.

This frenzied finance and extreme mismanagement results in a loss to the investors in First Security Deposit Corporation between $300,000-$400,000.

Edgerton is attorney for all of these companies and actually runs them. He is manager of the First Security Deposit Corporation, Investment Finance Company and the California Federal Savings and Loan Association. Attorneys fees paid by the Investment Finance Com-

pany and the First Security Deposit Corporation (prior to the time Edgerton became manager) for the period January 1, 1934, to April 1, 1938, were about $15,000. $5,000 would be excessive.

In order to qualify Miller, Hollowell, Starr and Edgerton as directors of the American National Bank, it was necessary that they have stock in the par value $1,000 and execute affidavits that this stock belonged to them free and clear and was unhypothecated in any way. The Investment Finance Company delivered to each of them the necessary stock and took from them promissory notes in the sum of $1,500 (the amount paid for it by the Investment Finance Company). There was no intent on the part of any of them to pay for the stock. Edgerton's and Starr's stock is held in the office of the Investment Finance Company assigned in blank by virtue of a separated assignment attached to the stock for easy removal in case of inspection. The same is true of Miller and Hollowell except that it is held in a safe deposit box in the bank. There is a gentlemen's agreement that no effort will be made to collect the notes. This is merely a subterfuge to get around the requirements of the government.' ''

The grounds of said error in overruling said objections of the defendant Edgerton to Plaintiff's Exhibit 216 and in denying his motion to strike said exhibit were and are the grounds of his objections hereinabove stated.

XXX.

Said District Court erred in denying the motion of the Defendant Edgerton for a severance made at the time of the offer of Plaintiff's Exhibit 216 in evidence and upon the conclusion of all of the evidence in the case.

The grounds of said motion were and the grounds of said error in denying said motion were and are the grounds substantially as hereinabove set forth in Assignment No. 29, which said grounds are incorporated in this assignment by reference. To which ruling of the court denying said motion for severance the Defendant Edgerton duly excepted.

XXXI.

Said District Court erred in denying the motion of the Defendant Edgerton that the court withdraw a juror and thereupon declare a mistrial because of the introduction and receipt in evidence of Plaintiff's Exhibit 216.

The grounds of said motion and the grounds of said error in denying said motion were and are the grounds substantially as hereinabove set forth in Assignment No. 29, which said grounds are incorporated in this assignment by reference. To which ruling of the court denying said motion for a mistrial the Defendant Edgerton duly excepted.

XXXII.

Said District Court erred in permitting the plaintiff's witness Bruce to testify over the objections and exceptions of defendants as follows:

The witness further testified: That as of August 31, 1940, the books of the Investment Finance Company reflected that there was an obligation due to First Security on notes payable in the amount of $240,465.80. That obligation was retired as of that date; assets were transferred to First Security.

"Q. Will you state what those assets were as reflected by the books?

Mr. Irwin: Might it be understood that this testimony as to the attorneys is particularly objected to as immaterial, and not within any of the issues of the case.

The Court: The objection may be considered to be made as to all defendants to whom the testimony is applicable; overruled; exception allowed subject to a motion to strike unless properly connected up.

Mr. Irwin: I should like to add the objection of hearsay.

The Court: It may also be considered to have been objected to on the ground of hearsay, and overruled; an exception allowed.

The Witness: Notes receivable, $44,010.02; obligations of the Pacific Brick Company, $38,-415.33; obligations of the Bond-17 Dog Food Company $111,018.81; obligations of the American Building and Investment Company, $19,-339.74; stock of the American National Bank of Santa Monica, $23,646.00; stock of the First Security Deposit Corporation, $29,984.80; sec-

ond trust deeds, $28.67; furniture and fixtures, $12.67. Prepaid expense, $17.47; Suspense, which is the reserve for contingencies, $250.25; total, $266,723.76.

By Mr. Campbell:

"Q. Now, with reference to the notes receivable, will you state of what items that consisted?

A. Battelle-Dwyer Brokerage Company, $1.00; C. E. Kenner, $1.00; Roy A. Muller, $6,543; P. S. Noon, $10,200; R. W. Starr, $11,050.50; J. Howard Edgerton, $20,084.25; Emery Hallowell $5,371; E. C. Thomas $236.21; A. R. Ireland $500; James White $23.06."

The grounds of said error in overruling said objections were and are the grounds of said objections set forth in this assignment of error.

XXXIII.

Said District Court erred in permitting the witness Bruce to testify over the objections and exceptions of the defendants as follows:

At the time of the transfer of the assets of the Investment Finance Company to the First Security in retirement of its obligations to the First Security, the Investment Finance Company transferred the notes payable to First Security, $250,465.80; reserves for depreciation on furniture and fixtures $3.15; notes payable to the American National Bank in Santa Monica $1,000; reserve for contingency $250.00; making a total of $251,718.95.

"Q. Now, as of that 31st day of August, 1940, what do the books and records of the Investment Finance Company reflect as to profit or loss from operations of that company?

Mr. Irwin: Your Honor, I don't mean to interrupt. My objection a few minutes ago goes to all this line of testimony, would it not?

The Court: Same objection and same ruling.

The Witness: The books reflect that the Investment Finance Company had a deficit of $16,393.19."

Said objection previously made was that same was immaterial and not pertinent to any issues tendered by the indictment.

The grounds of said error were and are the grounds of the objection set forth in this assignment of error.

XXXIV.

Said District Court erred in permitting evidence regarding transactions between the Pierce Petroleum Corporation and the Investment Finance Company over the objections and exceptions of the defendants and each of them. Plaintiff's Exhibit 180 is a letter dated January 3, 1936 bearing the receipt stamp of the State Corporation Department of California and signed "Investment Finance Company, by J. H. Edgerton, Vice-President and C. W. Twombly, Secretary" and containing consent to the contents of the letter on behalf of the Pierce Petroleum Corporation by J. H. Edgerton, President, and C. W. Twombly, Secretary, said

letter reciting that an agreement was entered into between the Pierce Petroleum Corporation and the Investment Finance Company on November 16, 1935 wherein the Pierce Petroleum Corporation agreed not to issue any stock without the consent of the Investment Finance and that certain escrow instructions were entered into; that the Investment Finance Company has been advised that the Pierce Petroleum has filed an application for the issuance of 1995 shares of stock to Boedecker, J. H. Edgerton and C. W. Twombly and that the Pierce Petroleum Corporation may consider the letter a written authorization for allowing said stock to be issued, copy of which is recited as being forwarded to the State Corporation Department.

Plaintiff's Exhibit 181 are the minutes of the annual stockholders' meeting of Pierce Petroleum Corporation held on February 19, 1937 showing stockholders present, namely, Boedecker, 100 shares, J. H. Edgerton, 200 shares, C. W. Twombly, 100 shares, Investment Finance Company by proxy, 5 shares.

"Mr. Campbell: Now reading from plaintiff's Exhibit 42, the journal of the Investment Finance Company, reading from page 204 of such journal:

A debit item of $24,369.80, loss on Pierce Petroleum well No. 1.

'To clear all accounts connected with Pierce Petroleum Lightburn Community Well No. 1 as oil well equipment and our

claim against Pierce Petroleum Corporation sold to B. E. Cockril and J. O. Spelt for $2,250 cash.'

"Mr. Campbell: The item is dated December 31, 1939, and is set forth on page 204 of plaintiff's Exhibit 42. The following debit items:

'Suspense, $2,250. Reserve for depreciation oil well equipment, $1,844.44, unearned discount accounts purchased, $2,653.18, unearned income on service rendered, $435.18, deposit Signal Hill Water Department, $150.00. Loss on Pierce Petroleum Well No. 1, $24,369.80.'

The following credit items:

'Accounts receivable, Pierce, $2,696.27, oil well equipment, $10,000; notes receivable, Pierce, $19,006.33. To clear all accounts connected with Pierce Petroleum Lightburn Community Well No. 1 as oil well equipment and our claims against Pierce Petroleum Corporation sold to B. E. Cockril and J. O. Spelt for $2,250.00 cash. Deposit consists of $150.00 deposited with the Signal Hill Water Department by the Pierce Petroleum Corporation, which is to be withdrawn and refunded to this company on February 15, 1939 as per agreement in file.' "

The motion was made to strike the portions of the minutes read from Plaintiff's Exhibit 42, which

said motion was granted by the court and the jury accordingly instructed; whereupon, over the objections and exceptions of the defendants, there was offered and received in evidence portions of the books and records of the Investment Finance Company (Plaintiff's Exhibit 39) showing loans by the Investment Finance Company to Pierce Petroleum as follows:

"Mr. Campbell: Reading now from plaintiff's Exhibit 39, the cash journal of the Investment Finance Company, from page 7 thereof.

'December 17, 1935.

Notes receivable — Pierce Petroleum, debit $2100; income from service rendered, credit, $435.18; unearned discount on accounts purchased, credit $2,564.82; to set up $21,000 notes receivable from Pierce Petroleum Corporation, dated 11/16/35 (with interest at 8 per cent from date) to cover indebtedness to Investment Finance Company for $15,000 cash deposited in trust #1855 with Western Trust and Savings Bank to buy claims of creditors of Pierce Petroleum Corporation — $1,000 chattel mortgage L No. 24 from Charles E. and Maryan A. Kenner—$1,000 chattel mortgage L No. 23 from Pierce Petroleum Corporation on equipment—$1,000 check of Charles E. Kenner returned account insufficient funds (held in cash account in

ledger) — services rendered by C. W. Twombly and J. H. Edgerton for Investment Finance Company, amount of $435.18 balance credited to Unearned Discounts on Accounts Purchased.'

The Court: Now, gentlemen of the jury, you must not connect in your minds this use of the name Kenner with the Kenner name which was in the statement made by Mr. Twombly. There is no proof here of the truth of the statement made by Mr. Twombly, and it wasn't put in, as I explained to you, for any other purpose than to show the condition of Mr. Twombly's mind from which might be indicated an intent so far as he is concerned.''

The grounds of said error in overruling said objections of the defendants were and are the grounds of the objections thereto, as follows:

(A) That same was immaterial and not pertinent to any issue tendered by the indictment in that:

1. The completed offense charged in the indictment is the advancing of money or property to the Investment Finance Company.

2. There is no evidentiary value insofar as the scheme itself is alleged in the indictment.

(B) Relates to collateral, matters and agreements not related to the scheme charged.

(C) Relates to separate, distinct and isolated ventures.

(D) The same is incompetent and irrelevant for the reason the same has no tendency to establish the specific intent to violate the law in the manner as described in the indictment and further, that mere state of mind is immaterial to the issues raised by the indictment.

XXXV.

Said District Court erred in receiving in evidence over the objections and exceptions of defendants evidence pertaining to the application of the Pacific Brick Company to sell and issue stock, and the issuance of certain shares of its common stock to certain defendants and the Investment Finance Company, and the transfer by the Investment Finance Company of certain obligations of the Pacific Brick Company to the First Security Deposit Corporation in part payment of its debt to said First Security.

Plaintiff's Exhibit 10 is an application dated May 27, 1937 addressed to the Department of Investment, Division of Corporations of the State of California, applying for a permit authorizing it to sell and issue its stock, reciting its previous incorporation, the names of its five directors, among which were the defendants J. Howard Edgerton and E. C. Thomas, describes the property it proposes to acquire, the nature of its business is to be that of extracting clay from said property and the manufacture of bricks and other clay products, and that it seeks a permit to issue 50,000 shares of common

stock of the par value of $1.00 per share and 50,000 shares of preferred stock of the par value of $1.00 per share.

Plaintiff's Exhibit 11 is an application for an amendment to permit to issue and sell securities, likewise addressed to the Division of Corporations of California, dated October 19, 1938, reciting that on October 11, 1938 a permit was issued to the Pacific Brick Company authorizing the company to issue to the persons named in its application an aggregate of not to exceed 10,000 of its common shares and further reciting that the Investment Finance Company was not named in the original application as a person or corporation to which applicant proposed to sell its shares, and requesting that the permit be amended to include the Investment Finance Company. The plaintiff was further permitted to show that the books and records of the Pacific Brick Company reflected that on the 20th day of August, 1937, 500 shares of its common stock was issued to defendant E. C. Thomas and 1410 shares to the defendant R. W. Starr. That the books and records of the Investment Finance Company disclosed that as of the 28th day of July, 1938 it had acquired 16,106 shares of the Pacific Brick Company for a consideration of $13,313.49, that as of August 5, 1938, it had acquired 5000 shares for a consideration of $5,000.00.

The witness Bruce was permitted to testify that the Investment Finance Company transferred obligations of the Pacific Brick Company in the sum of $38,415.33 to the First Security Deposit Corpora-

tion as part of the assets transferred in retirement of its obligation of $240,465.80 to said First Security.

The grounds of said error in overruling said objections of the defendants were and are the grounds of the objections thereto, as follows:

(A) That same was immaterial and not pertinent to any issue tendered by the indictment in that:

1. The completed offense charged in the indictment is the advancing of money or property to the Investment Finance Company.

2. There is no evidentiary value insofar as the scheme itself is alleged in the indictment.

(B) Relates to collateral, matters and agreements not related to the scheme charged.

(C) Relates to separate, distinct and isolated ventures.

In connection with the receipt of said evidence, the court made the following statement to the jury:

> "The Court: Well, the reason which I have announced, Gentlemen of the Jury, for admitting this evidence into the record is, it seems to me, material on account of the indictment, at least under the allegations which, in fact, say that money of the company was to be invested only in securities which were approved by the Superintendent of Banks or by the State Corporation Department, and that I am permitting this evidence to go as being material to the Plaintiff's case in connection with that allegation of the indictment."

XXXVI.

Said District Court erred in permitting evidence to be received concerning the loan of moneys by the Investment Finance Company to the Bond 17 Dog Food Company and the purchase of the common stock of said Dog Food Company by said Investment Finance Company, over the objections and exceptions of the defendants and each of them. And in permitting the Plaintiff's witness Bruce to testify over the objections and exceptions of the defendants and each of them that the Investment Finance Company transferred to the First Security Deposit Corporation as part of the retirement of its obligation to the First Security obligations of the Bond 17 Dog Food Company.

The witness Bruce testified that as of August 31, 1940, the books of the Investment Finance Company reflected that there was an obligation to the First Security Deposit Corporation of a note payable in the amount of $240,465.80; that said obligation was retired as of that date by the transfer of assets of the Investment Finance to the First Security. Said witness was permitted to testify that included in these assets transferred to the First Security were obligations of the Bond 17 Dog Food Company in the amount of $111,018.81 to the Investment Finance. The court permitted the evidence showing that between the period of February 1, 1938 and January 24, 1939 the Investment Finance Company had acquired 89,042 shares of the Bond 17 Dog Food Company at the price of $45,826.17; and that between the dates of May 10, 1938

and April 24, 1939 had loaned to the Bond 17 Dog Food Company at various dates sundry sums of money aggregating $63,800.00 upon which sundry repayments in the amount of $22,000.00 had been made leaving a balance of $41,800.00 which was transferred to a Notes Receivable account of the Investment Finance on May 1, 1939; that thereafter the Investment Finance loaned further sums during the period of May 2, 1939 and August 8, 1940, during which period no repayments were made, leaving as of August 31, 1940 an aggregate balance of Notes Receivable from said Dog Food Company of $65,150.00.

The grounds of said error in overruling said obligations of the defendants were and are the grounds of the objections thereto, as follows:

(A) That same was immaterial and not pertinent to any issue tendered by the indictment in that:

1. The completed offense charged in the indictment is the advancing of money or property to the Investment Finance Company.

2. There is no evidentiary value insofar as the scheme itself is alleged in the indictment.

(B) Relates to collateral, matters and agreements not related to the scheme charged.

(C) Relates to separate, distinct and isolated ventures.

In connection with the receipt of said evidence, the court made the following statement to the jury:

> "The Court: Well, the reason which I have announced, Gentlemen of the Jury, for admit-

ting this evidence into the record is, it seems to me, material on account of the indictment, at least under the allegations which, in fact, say that money of the company was to be invested only in securities which were approved by the Superintendent of Banks or by the State Corporation Department, and that I am permitting this evidence to go as being material to the Plaintiff's case in connection with that allegation of the indictment."

XXXVII

The District Court erred in receiving in evidence over the objections and exceptions of the defendants evidence pertaining to the application of the American Building and Investment Company to the said Corporation Commissioner of California for a permit to issue shares reflecting that the principal purpose of said corporation was investment in real estate loans, business investments and financing of a general insurance agency; that on August 12, 1938 the Investment Finance Company subscribed for and bought 17,000 shares of the 25,000 shares originally issued by said American Building and Investment Company, paying therefor the consideration of $17,000. Said Investment Finance Company transferred to the First Security Deposit Corporation in connection with the retirement of its obligation to said First Security on August 31, 1940 obligations of the American Building and Investment Company to it in the sum of $19,339.74.

The grounds of said error in overruling said ob-

jections of the defendants were and are the grounds of the objections thereto, as follows:

(A) That same was immaterial and not pertinent to any issue tendered by the indictment in that:

1. The completed offense charged in the indictment is the advancing of money or property to the Investment Finance Company.

2. There is no evidentiary value insofar as the scheme itself is alleged in the indictment.

(B) Relates to collateral, matters and agreements not related to the scheme charged.

(C) Relates to separate, distinct and isolated ventures.

In connection with the receipt of said evidence, the court made the following statement to the jury:

> "The Court: Well, the reason which I have announced, Gentlemen of the Jury, for admitting this evidence into the record is, it seems to me, material on account of the indictment, at least under the allegations which, in fact, say that money of the company was to be invested only in securities which were approved by the Superintendent of Banks or by the State Corporation Department, and that I am permitting this evidence to go as being material to the Plaintiff's case in connection with that allegation of the indictment."

XXXVIII

Said District Court erred in admitting in evidence over the objections and exceptions of the defendants the testimony of the Plaintiff's witness Bruce that as of August 31, 1940 the books of the

Investment Finance Company reflected that the obligation of the Investment Finance Company to the First Security in notes payable in the amount of $240,465.80 as of August 31, 1940 was retired in part by the transfer to said First Security of 23,646 shares of the common stock of the American National Bank of Santa Monica.

The grounds of said error in overruling said objections of the defendants were and are the grounds of the objections thereto, as follows:

(A) That same was immaterial and not pertinent to any issue tendered by the indictment in that:

1. The completed offense charged in the indictment is the advancing of money or property to the Investment Finance Company.

2. There is no evidentiary value insofar as the scheme itself is alleged in the indictment.

(B) Relates to collateral, matters and agreements not related to the scheme charged.

(C) Relates to separate, distinct and isolated ventures.

In connection with the receipt of said evidence, the court made the following statement to the jury:

> "The Court: Well, the reason which I have announced, Gentlemen of the Jury, for admitting this evidence into the record is, it seems to me, material on account of the indictment, at least under the allegations which, in fact, say that money of the company was to be invested only in securities which were approved by the Superintendent of Banks or by the State Cor-

poration Department, and that I am permitting this evidence to go as being material to the Plaintiff's case in connection with that allegation of the indictment."

XXXIX

Said District Court erred in each instance in denying the written motions of the defendant Edgerton, to strike and/or exclude from the consideration of the jury certain exhibits and testimony made at the conclusion of the plaintiff's case and renewed at the conclusion of all of the evidence in the case. The grounds of said errors in denying said motions to strike were and are the grounds set forth in said written motion which said written motion is set forth in full in the Bill of Exceptions and by reference is incorporated herein as though fully set forth.

CONCLUSION

Wherefore, the said J. Howard Edgerton, prays that by reason of the errors aforesaid, that the said judgments and sentences imposed against him be reversed and held for naught.

J. HOWARD EDGERTON,
By GORDON LAWSON and
OTTO CHRISTENSEN,
Attorneys for said J. Howard Edgerton.
By OTTO CHRISTENSEN.

Received copy of the within Assignment of Errors this 22nd day of July, 1942.

JAMES L. CRAWFORD,
Asst. U. S. Attorney.
Attorney for Plaintiff.

[Endorsed]: Filed July 22, 1942.

[Endorsed]: No. 10136. United States Circuit Court of Appeals for the Ninth Circuit. J. Howard Edgerton and Clifford W. Twombly, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed December 21, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
Ninth Circuit

Criminal Case No. 10136

J. HOWARD EDGERTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL AND DESIGNATION OF RECORD TO BE PRINTED.

The appellant hereby adopts as the points to be relied upon by him on appeal the assignment of errors appearing in the transcript of the record.

The appellant hereby requests that the entire transcript, excepting exhibits separately and directly certified, be printed.

Dated: January 11, 1943.

OTTO CHRISTENSEN and
GORDON LAWSON,
Attorneys for Appellant.

By OTTO CHRISTENSEN.

Received copy of the within *State,* etc., this 12th day of Jan., 1943.

LEO V. SILVERSTEIN,
U. S. Attorney.
HOWARD V. CALVERLEY,
Asst. U. S. Attorney.
Attorney for Appellee.

[Endorsed]: Filed Jan. 13, 1943. Paul P. O'Brien, Clerk.